



June 29, 2016

Delivered Via Electronic Mail

Ms. Brittany Martinez
U.S. Environmental Protection Agency
Office of Civil Rights
Mail Code 1201A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-1000

Re: Administrative Complaint against Alabama Department of Environmental Management, EPA File No. 13R-16-R4

Dear Ms. Martinez:

As you know, on February 24, 2016, the U.S. Environmental Protection Agency, Office of Civil Rights (OCR) accepted for investigation a complaint dated August 22, 2013 asserting that the Alabama Department of Environmental Management (ADEM) failed to develop, adopt and implement effective policies and procedures to comply with its affirmative non-discrimination obligations. In a letter dated April 21, 2016 and transmitted on June 27, 2016, I provided OCR with information concerning statutory limitations on the authority of ADEM to develop, adopt, and implement policies and procedures to comply with its affirmative non-discrimination obligations. This letter provides additional information on the same subject which I request be considered by OCR.

On September 21, 2004, twelve environmental organizations petitioned the Alabama Environmental Management Commission to amend existing rules to require that ADEM “publish in each notice of initial permit issuance, permit reissuance, and permit modification, demographic data on the race, color, national origin and income of the populations surrounding the facilities to be permitted.” (Exhibit A). Objections to the proposed rule were voiced by the Director of ADEM (Exhibit B), the Business Council of Alabama (Exhibit C), and National Solid Wastes Management Association (Exhibit D). The petition was denied by the Commission.

Among the reasons for his opposition to the proposed rule amendments, the Director of ADEM said:

The Department is not aware of any basis in the Environmental Management Act, or any of the individual state environmental laws administered by the Department, for consideration of demographics in permitting decisions. The same is true for federal environmental laws which are implemented by the Department pursuant to state law. Environmental quality standards, which are

demographically neutral and are established to protect human health and the environment, are the statutorily recognized criteria for permitting decisions.

Exhibit B at 2.

Among the reasons for its opposition to the proposed rule amendments, the Business Council of Alabama said:

The petition identifies five regulations for amendment. Each of these regulations arises from its own specific legislatively-enacted statute(s). It is those statutes that establish the parameters of ADEM's permitting of the activities at issue. None of those statutes authorize ADEM to develop or collect demographic data with respect to permitting activities. Nor do any of those statutes enable ADEM to require a permit applicant to develop or collect such data in its stead.

* * *

The lack of a statutory mandate for these proposed regulations is fatal. "If an agency promulgates rules or acts outside its jurisdictional limits as established by the enabling statute, the agency is said to be functioning ultra vires. . . . It is settled law that the provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation." *Kids' Club, Inc. v. State Department of Human Resources*, 874 So. 2d 1075, 1090 (Ala. Civ. App. 2003) (internal citations omitted). In the instant case, ADEM would be acting in an illegal ultra vires manner to promulgate a regulation requiring the collection of such data.

Exhibit C at 1-2.

Finally, among the reasons for its opposition to the proposed rule amendments, the National Solid Wastes Management Association said:

The petition identifies five regulations for amendment, each of which arises from its own specific legislatively-enacted statutes. It is those statutes that establish the parameters of the relevant ADEM permitting. None of those statutes authorize ADEM to develop or collect demographic data with respect to permitting activities. Nor do any of those statutes enable ADEM to require a permit applicant to develop or collect such data in its stead. Even generalized statements of ADEM's authority, such as those found in the provisions of the Alabama Environmental Management Act ("AEMA"), Ala. Code §§ 22-22A-1 through -16, do not provide the authority to undertake or require such demographic research efforts. Rather, those sections speak in general terms of ADEM promulgating rules, regulations, and standards to 'carry out the provisions

and intent of this chapter.” See Ala. Code § 22-22A-5(2). Absolutely no discussion exists of any intention by the legislature that the AEMA provide heightened environmental protection or analysis based on race or socioeconomic background. Rather, the legislature’s clear intent was that ADEM provide equal protection to all citizens of the state.

The proposed regulations cannot survive this lack of a statutory basis. “If an agency promulgates rules or acts outside its jurisdictional limits as established by the enabling statute, the agency is said to be “functioning *ultra vires* The provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation.” *Kids’ Club, Inc. v. State Department of Human Resources*, 874 So. 2d 1075, 1080 (Ala. Civ. App. 2003) (internal citations omitted). In the instant case, ADEM would be acting in an illegal *ultra vires* manner to promulgate a regulation requiring the collection of such data.

If Petitioners’ goal in seeking demographic information is to impose restrictions on the location of industrial facilities based solely on the surrounding communities’ socio-economic status, then they are asking ADEM to act well beyond the parameters of the department’s regulatory authority. Given the lack of statutory authority for such efforts currently in place, the proper forum for such efforts is, of course, the legislature. * * *

Exhibit D at 5.

The above statements regarding ADEM’s lack of statutory authority to collect and publish demographic data comports with the conclusions of the Environmental Management Commission in *Holmes v. Alabama Department of Environmental Management*, EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, 1998 WL 75094 (Ala. Env’tl. Mgmt. Comm’n Feb. 17, 1998), and *East Central Alabama Alliance for Quality Living v. Alabama Dep’t of Env’tl. Mgmt.*, EMC Docket Nos. 03-01 and 03-02, 2003 AL ENV LEXIS 6 (Ala. Env’tl. Mgmt. Comm’n Mar. 13, 2003), cited in the April 21, 2016 letter, that ADEM may not consider disparate racial impacts in its permit decisions.

Any attempt by ADEM to argue that it’s existing statutory authority is sufficient to permit it to adopt and implement effective policies and procedures to comply with its affirmative non-discrimination obligations under Title VI must be regarded with extreme skepticism. The consensus is that the Alabama Legislature needs to provide ADEM with additional statutory authority to comply with Title VI. Absent such authority, EPA should commence proceedings to annul, suspend or terminate EPA financial assistance to ADEM and deny any ADEM application for EPA financial assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "David A. Ludder".

David A. Ludder
Attorney for Complainants

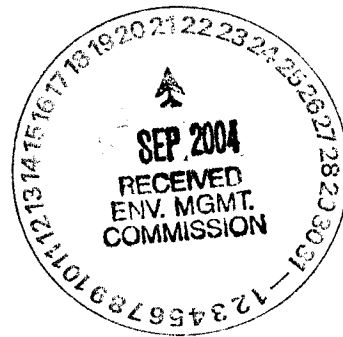
**BEFORE THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION**

IN THE MATTER OF:

PETITION TO AMEND ADEM ADMIN. CODE R.
335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-
.03, and 335-14-8-.08

(ALABAMA AFRICAN AMERICAN ENVIRONMENTAL JUSTICE ACTION NETWORK, ALABAMA ENVIRONMENTAL COUNCIL, ALABAMA ENVIRONMENTAL COUNCIL - HUNTSVILLE CHAPTER, ALABAMA RIVERS ALLIANCE, INC., ALABAMA WATCH, ASHUEST BAR/SMITH COMMUNITY ORGANIZATION, BLACK WARRIOR RIVER KEEPER, INC., CAHABA RIVER SOCIETY, INC., CONSERVATION UNLIMITED, FRIENDS OF LOCUST FORK RIVER, FRIENDS OF RURAL ALABAMA, INC., LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC., and SAND MOUNTAIN CONCERNED CITIZENS, INC.,

Petitioners).



**PETITION TO AMEND ADEM ADMIN. CODE
R. 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08**

I. INTRODUCTION

1. This Petition is to amend ADEM Admin. Code R. 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08 to require that the Alabama Department of Environmental Management publish in each notice of initial permit issuance, permit reissuance, and permit

modification, demographic data on the race, color, national origin and income of the populations surrounding the facilities to be permitted.

II. PETITIONERS

2. The Petitioners are:

ALABAMA AFRICAN-AMERICAN ENVIRONMENTAL JUSTICE ACTION NETWORK

P.O. Box 150196
Atlanta, Georgia 30315
Ph. 404-405-0625

ALABAMA ENVIRONMENTAL COUNCIL

2717 7th Avenue South
Suite 207
Birmingham, AL 35233
Ph. 205-322-3126

ALABAMA ENVIRONMENTAL COUNCIL - HUNTSVILLE CHAPTER

307 Shooting Star Tr.
Gurley, AL 35748
Ph. 256-776-4015

ALABAMA RIVERS ALLIANCE, INC.

2027 2nd Avenue North
Suite A
Birmingham, AL 35203
Ph. 205-322-6395

ALABAMA WATCH

412 N. Hull Street
Montgomery, AL 361043
Ph. 334-263-3022

ASHUEST BAR/SMITH COMMUNITY ORGANIZATION

436 Gleeden Drive
Tallassee, AL 36078
Ph. 334-283-4067

BLACK WARRIOR RIVERKEEPER, INC.

P.O. Box 59684
Birmingham, AL 35259
Ph. 205-288-0223

CAHABA RIVER SOCIETY, INC.

2717 Seventh Avenue South
Suite 205
Birmingham, Alabama 35233
Ph. 205-322-5326

CONSERVATION UNLIMITED

P.O. Box 5101
Montgomery, AL 36104
Ph. 334-546-4060

FRIENDS OF LOCUST FORK RIVER

P.O. Box 245
Hayden, AL 35079
Ph. 205-466-3858

FRIENDS OF RURAL ALABAMA, INC.

95 Cross Creek Lane
Ashville, AL 35953
Ph. 205-594-5943

LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.

1114 Thomasville Road
Suite E
Tallahassee, FL 32303
Ph. 850-681-2591

SAND MOUNTAIN CONCERNED CITIZENS, INC.

P.O. Box 428
Ider, AL 35981
Ph. 256-657-5704

The Petitioners are represented by:

DAVID A. LUDDER
Legal Environmental Assistance Foundation, Inc.
1114 Thomasville Road, Suite E
Tallahassee, Florida 32303
Ph. (850) 681-2591

III. STATEMENT OF INTERESTS

3. The Petitioners are organizations with diverse missions, however, each seeks to protect and enhance the quality of life of its members. These organizations represent minority and low income members who live in Alabama and who use the environmental resources (air, land and water) of Alabama. Petitioners seek to ensure that the Alabama Department of Environmental Management does not administer its programs in a way which has the effect of subjecting their members to discrimination because of their race, color, national origin, or income.

IV. PROPOSED AMENDMENTS TO R. 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08

4. The proposed amendments to ADEM Admin. Code R. 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08 are to require that the Alabama Department of Environmental Management publish in each notice of initial permit issuance, permit reissuance, and permit modification demographic data on the race, color, national origin and income of the populations surrounding the facilities to be permitted. The specific language of the proposed amendments is attached hereto as Exhibits "A," "B," "C," "D," and "E."

V. INFORMATION SUPPORTING PROPOSED AMENDMENT

5. The Alabama Department of Environmental Management is authorized to “serve as the State Agency responsible for administering federally approved or federally delegated environmental programs.” Ala. Code § 22-22A-5(4).

6. The Alabama Department of Environmental Management administers the National Pollutant Discharge Elimination System (NPDES) Permit Program under the Clean Water Act, 44 Fed. Reg. 61452 (Oct. 25, 1979); the State Implementation Plan for Alabama under the Clean Air Act, 40 C.F.R. § 52.53 (2003); the Title V Operating Permit Program under the Clean Air Act, 66 Fed. Reg. 54444 (2001); the Underground Injection Control Program under the Safe Drinking Water Act, 40 C.F.R. Part 147, Subpart B (2003); the Hazardous Waste Management Program (Phase I) under the Solid Waste Disposal Act, 52 Fed. Reg. 46466 (Dec. 22, 1987); the Public Water Systems Program under the Safe Drinking Water Act, 42 Fed. Reg. 29959 (June 10, 1977); and the Municipal Solid Waste Landfill Permit Program under the Resource Conservation and Recovery Act, 59 Fed. Reg. 9979 (1994).

7. The Alabama Department of Environmental Management is “authorized to take all actions necessary and appropriate to secure to this state the benefits of Federal Environmental Laws.” Ala. Code § 22-22A-4(n).

8. The Alabama Department of Environmental Management is authorized to “[a]pply for, where appropriate, accept, receive and administer grants or other funds or gifts from . . . the federal government, for the purpose of carrying out any of the functions, purposes or provisions of

[Ala. Code Chap. 22-22A] or any of the functions or provisions transferred to the department by [Ala. Code Chap. 22-22A].” Ala. Code § 22-22A-5(14).

9. The Alabama Department of Environmental Management has submitted many applications for grants to the U.S. Environmental Protection Agency.

10. The typical grant application form required by the U.S. Environmental Protection Agency requires that the applicant affirm that it “[w]ill comply with all Federal statutes relating to nondiscrimination.” Exhibit “F.”

11. The Alabama Department of Environmental Management is authorized to “[e]nter into agreements and contracts, where appropriate, with . . . the federal government . . . in order to accomplish the purposes of [Ala. Code Chap 22-22A].” Ala. Code § 22-22A-5(8).

12. The U. S. Environmental Protection Agency has awarded multiple grants to the Alabama Department of Environmental Management. Current grant projects are identified in Exhibit “G.” Fifty-one percent (\$23,690,416) of the Alabama Department of Environmental Management’s 2003 operating budget was from federal funding. Exhibit “H.”

13. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, establishes the right of every person in Alabama to be free from discrimination under any program or activity receiving Federal financial assistance. It states:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

14. Section 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1, authorizes the U.S. Environmental Protection Agency to adopt rules to effectuate the provisions of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. It states:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

15. The U.S. Environmental Protection Agency has promulgated 40 C.F.R. § 7.35(b) which provides:

A recipient [of EPA financial assistance] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

16. “Title VI creates for recipients a nondiscrimination obligation that is contractual in nature in exchange for accepting Federal funding. Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as any EPA funding is extended.” Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (<http://www.epa.gov/ocrpage1/docs/interim.pdf>). “Under amendments made to Title VI by the Civil Rights Restoration Act of 1987, a “program” or “activity” means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance. Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that

receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the actions they take under programs that do not derive their authority from EPA statutes (*e.g.*, state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA." *Id.*

17. If the U.S. Environmental Protection Agency determines that the Alabama Department of Environmental Management has used criteria or methods of administering its program(s) which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or income or have the effect of defeating or substantially impairing accomplishment of the objectives of the program(s) with respect to individuals of a particular race, color, national origin, or income the Agency is authorized to deny, annul, suspend or terminate financial assistance to the Department. 40 C.F.R. § 7.130 provides:

(a) General. If compliance with this part cannot be assured by informal means, EPA may terminate or refuse to award or to continue assistance. EPA may also use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.

(b) Procedure to deny, annul, suspend or terminate EPA assistance--

(1) OCR finding. If OCR determines that an applicant or recipient is not in compliance with this part, and if compliance cannot be achieved voluntarily, OCR shall make a finding of noncompliance. The OCR will notify the applicant or recipient (by registered mail, return receipt requested) of the finding, the action proposed to be taken, and the opportunity for an evidentiary hearing.

(2) Hearing.

(i) Within 30 days of receipt of the above notice, the applicant or recipient shall file a written answer, under oath or affirmation, and may request a hearing.

(ii) The answer and request for a hearing shall be sent by registered mail, return receipt requested, to the Chief Administrative Law Judge (ALJ) (A-110), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Upon receipt of a request for a hearing, the ALJ will send the applicant or recipient a copy of the ALJ's procedures. If the recipient does not request a hearing, it shall be deemed to have waived its right to a hearing, and the OCR finding shall be deemed to be the ALJ's determination.

(3) Final decision and disposition.

(i) The applicant or recipient may, within 30 days of receipt of the ALJ's determination, file with the Administrator its exceptions to that determination. When such exceptions are filed, the Administrator may, within 45 days after the ALJ's determination, serve to the applicant or recipient, a notice that he/she will review the determination. In the absence of either exceptions or notice of review, the ALJ's determination shall constitute the Administrator's final decision.

(ii) If the Administrator reviews the ALJ's determination, all parties shall be given reasonable opportunity to file written statements. A copy of the Administrator's decision will be sent to the applicant or recipient.

(iii) If the Administrator's decision is to deny an application, or annul, suspend or terminate EPA assistance, that decision becomes effective thirty (30) days from the date on which the Administrator submits a full written report of the circumstances and grounds for such action to the Committees of the House and Senate having legislative jurisdiction over the program or activity involved. The decision of the Administrator shall not be subject to further administrative appeal under EPA's General Regulation for Assistance Programs (40 CFR part 30, subpart L).

(4) Scope of decision. The denial, annulment, termination or suspension shall be limited to the particular applicant or recipient who was found to have discriminated, and shall be limited in its effect to the particular program or the part of it in which the discrimination was found.

18. Eight complaints of discrimination under Title VI have been filed against the Alabama Department of Environmental Management with the U.S. Environmental Protection Agency. These complaints were rejected because the allegations were insufficient to constitute a complaint; rejected because the allegations were unsupported by the facts; rejected because filed after expiration of the 180-day deadline; dismissed because no adverse impact was found; dismissed because no discrimination was found; or remain under review. Exhibit "I." More complaints are likely to be filed in the future.

19. In June 2004, the Legal Environmental Assistance Foundation, Inc. published a study entitled "Race, Poverty, and Environmental Burdens: Injustice in Alabama - Part I Municipal Solid Waste Landfills." Exhibit "J." The conclusion of the study was that 20 of 29 municipal solid waste landfills are located in areas of high minority or low income populations. Future permitting of similar facilities in a similar manner is likely to result in additional complaints of discrimination under Title VI being filed against the Alabama Department of Environmental Management.

20. In September 2004, the Legal Environmental Assistance Foundation, Inc. published data on the demographics of communities surrounding the top 50 toxic air pollution sources in Alabama. Exhibit "K." Those data demonstrate that minority and, to a lesser extent, poor communities, are disproportionately burdened by toxic air pollution sources. Future permitting of similar facilities in a similar manner may result in complaints of discrimination under Title VI being filed against the Alabama Department of Environmental Management.

21. The issuance, reissuance and modification of permits for polluting facilities that may have the effect of subjecting individuals to discrimination because of their race, color, national

origin, or income or have the effect of defeating or substantially impairing accomplishment of the objectives of the program(s) with respect to individuals of a particular race, color, national origin or income will cause injury to members of Petitioners and place in jeopardy federal grants received by the Alabama Department of Environmental Management.

22. The routine collection and analysis of demographic data on the race, color, national origin, and income of the populations surrounding polluting facilities that have applied for the issuance, reissuance, or modification of permits is appropriate to ensure that such facilities do not have the effect of subjecting individuals to discrimination because of their race, color, national origin, or income or have the effect of defeating or substantially impairing accomplishment of the objectives of the program(s) with respect to individuals of a particular race, color, national origin or income.

23. The routine collection and analysis of demographic data on the race, color, national origin, and income of the populations surrounding polluting facilities that have applied for the issuance, reissuance, or modification of permits is appropriate to ensure that federal funding received by the Alabama Department of Environmental Management is not denied, annulled, suspended or terminated or placed in jeopardy of denial, annulment, suspension or termination.

24. The Alabama Department of Environmental Management is authorized to perform any duty or take any action necessary for the implementation and enforcement of Ala. Code Chap. 22-22A. Ala. Code § 22-22A-5(20).

25. The Alabama Department of Environmental Management, “[a]cting through the Environmental Management Commission, [is authorized to] promulgate rules [and] regulations . .

. in order to carry out the provisions and intent of [Ala. Code Chap. 22-22A].” Ala. Code § 22-22A-5(2).

VI. Other Factors for Consideration

26. There is no constitutional impediment to the adoption of the proposed amendment. The Commission is authorized to adopt the proposed amendments by Ala. Code §§ 22-22A-5(2), 22-22A-6 and 22-22A-8.

27. The proposed amendments will promote the expressed legislative intent and purposes of the Alabama Environmental Management Act, Ala. Code Chap. 22-22A. The intent of the Alabama Environmental Management Act is that the Alabama Department of Environmental Management “serve as the State Agency responsible for administering federally approved or federally delegated environmental programs,” Ala. Code § 22-22A-5(4), that the Alabama Department of Environmental Management “secure to this state the benefits of Federal Environmental Laws,” Ala. Code § 22-22A-4(n), and that the Alabama Department of Environmental Management “[a]pply for, where appropriate, accept, receive and administer grants . . . from . . . the federal government.” Ala. Code § 22-22A-5(14). Among the purposes of the Alabama Environmental Management Act is the protection of human health and safety. Ala. Code § 22-22A-2.

28. The information submitted with this petition is substantive, credible and relevant and reasonably supports the adoption of the proposed amendments.

29. The Petitioners have not had a prior opportunity to present relevant evidence, data and information on the subject matter of the proposed amendments.

30. Alternative means of obtaining the same or similar relief are not presently available and have not in the recent past been made available to the Petitioners.

31. The proposed amendments will enhance the established programs for protecting human health and safety. Furthermore, the proposed amendments will promote the underlying policies of the Alabama Environmental Management Act, Ala. Code Chap. 22-22A, identified herein.

VII. DISPOSITION OF PETITION

32. ADEM Admin Code R. 335-2-2-.06 provides:

Disposition of Petition. Within sixty days after a petition is filed with the Commission in accordance with Rule 335-2-2-.04, the Commission shall do one of the following, provided however, that upon written notice to the petitioner, such sixty day period may be extended for not more than thirty days if the Commission's next regularly scheduled meeting is not within said sixty day period:

(a) initiate rule-making proceedings in accordance with Ala. Code 1975, §§ 22-22A-8 and 41-22-5, as amended; or

(b) deny the petition in writing on the merits stating the reasons therefor.

See also Ala. Code § 41-22-8.

33. For the convenience of the Commission, Petitioners waive the time requirements of ADEM Admin. Code R. 335-2-2-.06 and Ala. Code § 41-22-8 only until October 19, 2004.

Respectfully submitted this 15th day of September, 2004.

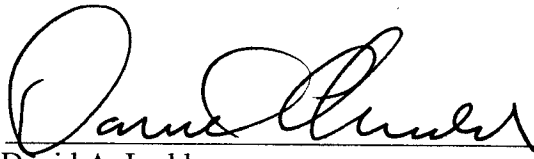
By: 
David A. Ludder
Attorney for Petitioners

EXHIBIT "A"

335-3-14-.01 General Provisions.

(1) Air Permit.

(a) Any person building, erecting, altering, or replacing any article, machine, equipment, or other contrivance, the use of which may cause the issuance of or an increase in the issuance of air contaminants or the use of which may eliminate or reduce or control the issuance of air contaminants, shall submit an application for an Air Permit at least 10 days prior to construction.

(b) Before any article, machine, equipment, or other contrivance described in subparagraph (a) of this paragraph may be operated or used, authorization shall be obtained from the Director in the form of an Air Permit. No Permit shall be granted for any article, machine, equipment or contrivance described in subparagraph (a) of this paragraph, constructed or installed without notification as required by subparagraph (a) of this paragraph, until the information required is presented to the Director and such article, machine, equipment or contrivance is altered, if necessary, and made to conform to the standards established by the Department.

(c) Any article, machine, equipment, or other contrivance described in subparagraph (a) of this paragraph which is presently operating (or which is not presently operating but which is capable of being operated) without an Air Permit may continue to operate (or may restart) only if its owner or operator obtains an Air Permit prior to a date to be set by the Director (or prior to restarting).

(d) Display of Air Permit. A person who has been granted an Air Permit for any article, machine, equipment, or other contrivance shall keep such permit under file or on display at all times at the site where the article, machine, equipment, or other contrivance is located and will make such a permit readily available for inspection by any and all persons who may request to see it.

(e) The Director shall have the authority to decide cases where an article, machine, equipment, or other contrivance is not clearly subject to nor exempt from the application of this Rule. In addition, the Director may rule that a particular article, machine, equipment, or other contrivance is subject to the application of this Rule even though it is exempt from the system according to subparagraph (a) of this paragraph and paragraph (5) of this Rule. The operator or builder of such an article, machine, equipment, or other contrivance may appeal the Director's

classification to the Commission, which shall overrule the Director only if it is shown that he acted arbitrarily and contrary to the purposes of the Act.

(f) Upon completion of construction by a new facility, the Director shall, within a reasonable period of time, dispatch an inspector to the facility in question. If the inspector determines that the facility has been constructed according to the specifications as set forth under the Air Permit or that any changes to the facility would reduce or affect to an insubstantial degree that quantity of air contaminants emitted by the facility, and if a reviewing officer of the Division agrees with this conclusion, then the Director shall authorize initial operation of the facility until an official inspection of the facility under actual operating conditions can be made and the results reviewed or until the Air Permit is suspended or revoked by the Director. The Director may authorize initial operation of the facility without an inspection if upon completion of the construction, an owner or operator familiar with the application for an Air Permit submits a letter to the Director, testifying that the construction under application has been completed and is in accordance with the specification as set down in the Air Permit. The Director is empowered to reject that testimony if the Director decides that the owner or operator's qualifications are insufficient to allow him to accurately and completely assess the equipment in question. An owner or operator may appeal any such judgment to the Commission.

(g) The Director may issue an Air Permit subject to conditions which will bring the operation of any article, machine, equipment, or other contrivance within the standards of Rule 335-3-14-.03(1) in which case the conditions shall be specified in writing. Commencing construction or operation under such an Air Permit shall be deemed acceptance of all the conditions specified. The Director shall issue an Air Permit with revised conditions upon receipt of a new application, if the applicant demonstrates that the article, machine, equipment, or other contrivance can operate within the standards of Rule 335-3-14-.03(1) under the revised conditions.

(h) Reserved.

(i) Reserved.

(j) Reserved.

(k) An existing facility which holds a Synthetic Minor Operating Permit issued under Chapter 335-3-15 or an Operating Permit issued under Chapter 335-3-16 is exempt from the requirements of this chapter provided that:

1. the Synthetic Minor Operating Permit is modified as required by Chapter 335-3-15 prior to the initial operation of any new or modified sources, or
2. the Operating Permit is modified as required by Chapter 335-3-16 and any modifications are not subject to the requirements of Rule 335-3-14-.04, or
3. for a modification which is subject to the requirements of Rule 335-3-14-.04, the Operating Permit is issued prior to commencement of construction of the modification, and the Operating Permit fulfills all requirements of Rule 335-3-14-.04, or
4. the Operating Permit is modified as required by Chapter 335-3-16 and any modifications are not subject to the requirements of Rule 335-3-14-.05, or
5. for a modification which is subject to the requirements of Rule 335-3-14-.05, the Operating Permit is issued prior to commencement of construction of the modification, and the Operating Permit fulfills all requirements of Rule 335-3-14-.05.

(2) Provision of Sampling and Testing Facilities. A person operating or using any article, machine, equipment or other contrivance for which these rules and regulations require a permit shall provide and maintain such sampling and testing facilities as specified in the Air Permit.

(3) The holder of a Permit under this Rule shall comply with conditions contained in such Permit as well as all applicable provisions of these rules and regulations.

(4) Transfer. An Air Permit shall not be transferable whether by operation of law or otherwise, either from one location to another, from one piece of equipment to another, or from one person to another.

(5) Exemptions. From time to time the Director may specify certain classes or sizes of articles, machines, equipment, or other contrivances which would normally be subject to the requirements to apply for an Air Permit as being exempt from the requirement to apply for such permits. Exempt sources are subject in every other way to these rules and regulations.

(6) Delegation of Air Permit requirements to Local Air Pollution Control Programs.

(a) Local air pollution control programs may receive delegation of authority from the Director to administer the general Air Permit requirements of paragraph (1) of this Rule within their jurisdiction provided the local air pollution control program:

1. adopts regulations insuring applicants are required to satisfy the same requirements as contained in the Department's regulations; and
2. adopts regulations which require the Director to be provided with an opportunity to review the permit application, the analysis of the permit, and proposed permit conditions at least 10 days prior to issuance of an Air Permit.

(b) Local air pollution control programs may receive delegation of authority from the Director to administer the Air Permit requirements of Rules 335-3-14-.05 and 335-3-14-.04 within their jurisdiction provided:

1. the requirements of subparagraph (a)1. of this paragraph are met; and
2. the local air pollution control program demonstrates that it has the necessary manpower and technical expertise to implement the requirements of said regulations; and
3. the local air pollution control program adopts regulations which require that the local air pollution control program shall provide the Director a copy of preliminary determinations and public comment notices for all permits issued pursuant to Rules 335-3-14-.05 and 335-3-14-.04 at the same time the notice is forwarded for publication in the newspaper.

(c) If the Director of ADEM determines that local program procedures for implementing all the portions of Rules 335-3-14-.01(1), 335-3-14-.04, and 335-3-14-.05 are inadequate, or are not being effectively carried out, any authority delegated to the local programs to administer Rules 335-3-14-.01(1), 335-3-14-.04, and 335-3-14-.05 may be revoked in whole or in part. Any such revocation shall be effective as of the date specified in a Notice of Revocation to the local air pollution control program.

(d) The Director reserves the authority contained in Rule 335-3-14-.02(4), to revoke any Air Permit issued pursuant to this Rule.

(e) Any Air Permit issued by a local air pollution control program, including all conditions contained therein, is enforceable by the ADEM.

(7) Public Participation.

(a) Notice shall be given by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice and also to persons on a mailing list developed by the Department for persons desiring notice of permit action, including persons who have requested in writing to be on such a list, under the following circumstances:

1. Construction at a Greenfield Site.

(i) For the purposes of this paragraph, a "Greenfield Site" shall mean a new development or the initial operation of a new facility.

2. The Director, at his discretion, may require Public Notification for any application received in accordance with subparagraph (1)(a) of this Rule.

(b) Public comments will be received by the Department for a period of 15 days following the publication of the public notice.

(c) Public Notice will be held in accordance with the requirements of Rules 335-3-14-.04, 335-3-14-.05, or 335-3-14-.06 for any application which is subject to the requirements of Rules 335-3-14-.04, 335-3-14-.05, or 335-3-14-.06, respectively.

(d) Construction of any article, machine, equipment, or other contrivance as described in subparagraph (1)(a) of this Rule shall not commence until after an Air Permit is issued if a public notice is required under this Rule.

(e) Any public notice published pursuant to this paragraph shall include demographic data on race, color, national origin, and income within three circular areas the center point of which is the existing or proposed article, machine, equipment, or other contrivance and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles.

EXHIBIT "B"

335-3-15-.05 Public Participation.

(a) The provisions of this Rule apply only to potential major sources as specified in Rules 335-3-15-.04(1)(b) and -.04(4)(b). Notice shall be given by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice and also to persons on a mailing list developed by the Department for persons desiring notice of permit action, including persons who have requested in writing to be on such a list. A copy of the notice shall also be provided to EPA.;

(b) The notice shall identify the affected facility; the name and address of the permittee; the address of the Department; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, except for information entitled to be kept confidential, and all other materials available to the Department that are relevant to the permit decision; a brief description of the comment procedures required by this Rule; ~~and~~ the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled); and demographic data on race, color, national origin, and income within three circular areas the center point of which is the facility and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles;

(c) The Department shall provide at least 15 days for public comment; and

(d) The Department shall keep a record of the commenters and also of the issues raised during the public participation process.

EXHIBIT "C"

335-6-6-.21 Public Notice Requirements.

(1) Actions Requiring Public Notice. The Director shall give public notice that the following actions have occurred:

(a) A NPDES Permit application has been received and a draft NPDES permit or draft modification to an NPDES permit has been prepared and a tentative determination made to issue or reissue the permit or modification;

(b) A NPDES Permit application has been received and a tentative determination to deny a permit application has been made;

(c) A tentative determination has been made to revoke and reissue an NPDES;

(d) A tentative determination has been made to terminate an NPDES permit (except that if the determination results from the permanent termination of the flow or by connection to the POTW, the Director may terminate the permit by providing 30-day notice to the permittee); or

(e) A public hearing has been scheduled.

(2) Duration of Public Notice Periods

(a) Public notice of the receipt of an application and the preparation of a draft permit or draft modification to a permit, including a notice of intent to deny a permit application or termination of a permit shall allow at least 30 days for public comment.

(b) Public notice of a public hearing shall be given at least 30 days before the hearing. Public notice of the hearing may be given at the same time as public notice of the application and draft permit and the two notices may be combined.

(3) Methods of Public Notice. Public notice of activities described in paragraph 335-6-6-.21(2) above shall be given by the methods listed below:

(a) By mailing a copy of a notice to the persons listed below. Any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice for any classes and categories of permits:

1. The permit applicant.

2. Any other agency which the Director knows has issued or is required to issue a RCRA, UIC, PSD, NPDES or 404 permit for the same facility or activity.
3. Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State Historic Preservation Officers, and other appropriate government authorities, including any affected states.
4. Any state agency responsible for plan development under the FWPCA Section 208(b)(2), 208(b)(4) or 303(e) and the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.
5. Any indirect discharger identified in the permit application of a publicly or privately owned treatment works.
6. Persons on a mailing list developed by:
 - (i) including those who request in writing to be on the list;
 - (ii) notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and state funded newsletters, environmental bulletins, or state law journals (the Director may update the mailing list from time to time by requesting written indication of continued interest from those listed and may delete from the list the name of any person who fails to respond to such a request);
7. To any unit of local government having jurisdiction over the area where the facility is or is proposed to be located.
8. To each state agency having any authority under state law with respect to the construction or operation of such facility.
 - (b) By publication of a notice in a daily or weekly newspaper of general circulation within the area affected by the facility or activity.
 - (4) Content of Public Notices
 - (a) All public notices issued under this Rule shall contain the following minimum information:

1. name and address of the office processing the permit action for which notice is being given;
2. name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit (when an address is not applicable to the regulated entity a general location shall be given);
3. name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit, statement of basis or fact sheet, and the application;
4. a general description of the public comment procedures required by Rule 335-6-6-.21 and the time and place of any hearing that will be held, (if applicable) including a statement of procedures to request a hearing, unless a hearing has already been scheduled, and other procedures by which the public may participate in the final permit decision;
5. a general description of the location of each existing or proposed discharge point and the name of the receiving water; and
6. a general description of the activity or business conducted at the facility generating the wastewater; and
7. demographic data on race, color, national origin, and income within three circular areas the center point of which is the existing or proposed discharge point and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles.

(b) Public Notices for Hearings. In addition to the general public notice requirements, the public notice of a hearing shall contain the following information:

1. a reference to the date of previous public notices relating to the permit;
2. date, time, and place of the hearing; and
3. a description of the nature and purpose of the hearing, including a citation of the applicable rules and procedures.

(5) Public comments and Requests for Public Hearings. During the public comment period, any interested person may submit written comments on the permit application and draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a

public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in paragraph 335-6-6-.21(7).

(6) Public Hearings

(a) The Director shall hold a public hearing whenever it is found, on the basis of hearing requests, that there exists a significant degree of public interest in a permit application or a draft permit.

(b) The Director may also hold a public hearing at his or her discretion whenever such a hearing might clarify one or more issues involved in the permit decision;

(c) Any person may submit oral or written statements and data concerning the permit application or the draft permit. Reasonable limits may be set upon the time allowed for oral statement, and the submission of statements in writing may be required. The public comment period shall automatically be extended to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(d) A tape recording or written transcript of the hearing shall be made available to the public.

(7) Response to Comments. At the time that any final permit decision is issued, the Department shall prepare a response to comments which shall be made available to the public. This response shall:

(a) specify which provisions, if any, of the draft permit have been changed by the final permit decision, and the reasons for the change and

(b) describe and respond to all significant comments (like comments may be grouped and one response written), concerning the draft permit, raised during the public comment period or during any hearing. A significant comment is a comment that offers information or suggestions of a technical, environmental, legal, or regulatory nature that are applicable to the proposed permit.

(8) Comments from Governmental Agencies

(a) If during the comment period for an NPDES draft permit, the District Engineer of the U.S. Army Corps of Engineers advises the Director in writing that anchorage and navigation of any of the waters of the United States would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advises the Director that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the Director shall include the specified conditions in the permit. Review or appeal of a permit denial or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers, those conditions shall be considered stayed in the NPDES permit for the duration of that appeal or review.

(b) If during the comment period the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, or any other state or federal agency with jurisdiction over fish, wildlife, or public health advised the Director in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial impairment of fish, shellfish, a public water supply, or wildlife resources, the Director may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of the FWPCA.

(c) In appropriate cases the Director may consult with one or more of the agencies referred to in this Rule before issuing a draft permit and may reflect their views in the statement of basis, the fact sheet, or the draft permit.

EXHIBIT "D"

335-13-5-.03 Public Notice

(1) Notice Requirements.

(a) The Department shall provide notice and an opportunity for a public hearing on any landfill unit permit if determined necessary to meet the requirements of this Division.

(b) The following procedures shall be observed.

1. The Department shall notify interested and potentially interested persons of the proposed landfill unit by publishing a notice in a newspaper of general circulation in the area.

(i) The notice shall be given not less than 35 days prior to the proposed issuance of a permit.

(ii) The notice shall contain the specific type and nature of the landfill unit, the type of waste to be disposed, the person or agency requesting the permit, and the descriptive location of the landfill unit, address and telephone number of the Department, and that interested persons may request a public hearing on the proposed landfill unit.

(iii) . The notice shall also contain demographic data on race, color, national origin, and income within three circular areas the center point of which is the existing or proposed landfill unit and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles.

2. Landowners adjacent to a proposed landfill unit shall receive a copy of public notice.

(2) Departmental Action. The Department shall take one of the following actions after the hearing:

(a) Deny the permit, stating in writing the reasons for denial and inform the person requesting the permit of appeal procedures in 335-13-1-.07;

(b) Issue the permit if the application complies with this Division; or

(c) Require additional information, elements of design for the facility, and specify procedures for inclusion into the permit prior to issuance of the permit.

EXHIBIT “E”

335-14-8-.08 Procedures for Decisionmaking - Treatment, Storage, and Disposal Facility Permits

(1) **Specific Procedures Applicable to AHWMMMA Permits.**

(a) **Pre-application public meeting and notice.**

1. **Applicability.** The requirements of 335-14-8-.08(1) shall apply to all AHWMMMA Part B applications seeking initial permits for hazardous waste management units over which ADEM has permit issuance authority. The requirements of 335-14-8-.08(1) shall also apply to AHWMMMA Part B applications seeking renewal of permits for such units, where the renewal application is proposing a significant change in facility operations. For the purposes of 335-14-8-.08(1), a “significant change” is any change that would qualify as a major permit modification under 335-14-8-.04(2). The requirements of 335-14-8-.08(1) do not apply to permit modifications under 335-14-8-.04(2) and (3) or to applications that are submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

2. Prior to the submission of an AHWMMMA Part B permit application for a facility, the applicant must hold at least one meeting with the public in order to solicit questions from the community and inform the community of proposed hazardous waste management activities. The applicant shall post a sign-in sheet or otherwise provide a voluntary opportunity for attendees to provide their names and addresses.

3. The applicant shall submit a summary of the meeting, along with the list of attendees and their addresses developed under 335-14-8-.08(1)(a)2., and copies of any written comments or materials submitted at the meeting, to the Department as a part of the Part B application, in accordance with 335-14-8-.02(5)(b).

4. The applicant must provide public notice of the pre-application meeting at least 30 days prior to the meeting. The applicant must maintain, and provide to the Department upon request, documentation of the notice.

(i) The applicant shall provide public notice in all of the following forms:

(I) A newspaper advertisement. The applicant shall publish a notice, fulfilling the requirements in 335-14-8-.08(1)(a)4.(ii), in a newspaper of general circulation in the county or

equivalent jurisdiction that hosts the proposed location of the facility. In addition, the Department shall instruct the applicant to publish the notice in newspapers of general circulation in adjacent counties or equivalent jurisdictions, where the Department determines that such publication is necessary to inform the affected public. The notice must be published as a display advertisement.

(II) A visible and accessible sign. The applicant shall post a notice on a clearly marked sign at or near the facility, fulfilling the requirements in 335-14-8-.08(1)(a)4.(ii). If the applicant places the sign on the facility property, then the sign must be large enough to be readable from the nearest point where the public would pass by the site.

(III) A broadcast media announcement. The applicant shall broadcast a notice, fulfilling the requirements in 335-14-8-.08(1)(a)4.(ii), at least once on at least one local radio station or television station. The applicant may employ another medium with prior approval of the Department.

(IV) A notice to the Department. The applicant shall send a copy of the newspaper notice to the Department and to the appropriate units of State of Alabama and local government, in accordance with 335-14-8-.08(6)(c)1.(v).

(ii) The notices required under 335-14-8-.08(1)(a)4.(i) must include:

(I) The date, time, and location of the meeting;

(II) A brief description of the purpose of the meeting;

(III) A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location;

(IV) A statement encouraging people to contact the facility at least 72 hours before the meeting if they need special access to participate in the meeting; ~~and~~

(V) The name, address, and telephone number of a contact person for the applicant; and

(VI) Demographic data on race, color, national origin, and income within three circular areas the center point of which is the facility and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles.

(b) Public notice requirements at the application stage.

1. Applicability. The requirements of 335-14-8-.08(1) shall apply to all AHWMMMA Part B applications seeking initial permits for hazardous waste management units over which ADEM has permit issuance authority. The requirements of 335-14-8-.08(1) shall also apply to AHWMMMA Part B applications seeking renewal of permits for such units under 335-14-8-.05(2). The requirements of 335-14-8-.08(1) do not apply to permit modifications pursuant to 335-14-8-.04(2) and (3) or permit applications submitted for the sole purpose of conducting post-closure activities or post-closure activities and corrective action at a facility.

2. Notification at application submittal.

(i) The Department shall provide public notice as set forth in 335-14-8-.08(6)(c)1.(iv), and notice to appropriate units of State of Alabama and local government as set forth in 335-14-8-.08(6)(c)1.(v), that a Part B permit application has been submitted to the Department and is available for review.

(ii) The notice shall be published within a reasonable period of time after the application is received by the Department. The notice must include:

(I) The name and telephone number of the applicant's contact person;

(II) The name and telephone number of the Department's contact office, and a mailing address to which information, opinions, and inquiries may be directed throughout the permit review process;

(III) An address to which people can write in order to be put on the facility mailing list;

(IV) The location where copies of the permit application and any supporting documents can be viewed and copied;

(V) A brief description of the facility and proposed operations, including the address or a map (e.g., a sketched or copied street map) of the facility location on the front page of the notice; and

(VI) The date that the application was submitted; and

(VII) Demographic data on race, color, national origin, and income within three circular areas the center point of which is the facility and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles.

3. Concurrent with the notice required under 335-14-8-.08(1)(b)2., the Department must place the permit application and any supporting documents in a location accessible to the public in the vicinity of the facility or at the Department's office.

(c) Information repository.

1. Applicability. The requirements of 335-14-8-.08(1) apply to all applications seeking AHWMMMA permits for hazardous waste management units over which ADEM has permit issuance authority.

2. The Department may assess the need, on a case-by-case basis, for an information repository. When assessing the need for an information repository, the Department shall consider a variety of factors, including: the level of public interest; the type of facility; the presence of an existing repository; and the proximity to the nearest copy of the administrative record. If the Department determines, at any time after submittal of a permit application, that there is a need for a repository, then the Department shall notify the facility that it must establish and maintain an information repository. (See 335-14-8-.03(1)(m) for similar provisions relating to the information repository during the life of a permit.)

3. The information repository shall contain all documents, reports, data, and information deemed necessary by the Department to fulfill the purposes for which the repository is established. The Department shall have the discretion to limit the contents of the repository.

4. The information repository shall be located and maintained at a site chosen by the facility. If the Department finds the site unsuitable for the purposes and persons for which it was established, due to problems with the location, hours of availability, access, or other relevant considerations, then the Department shall specify a more appropriate site.

5. The Department shall specify requirements for informing the public about the information repository. At a minimum, the Department shall require the facility to provide a written notice about the information repository to all individuals on the facility mailing list.

6. The facility owner/operator shall be responsible for maintaining and updating the repository with appropriate information throughout a time period specified by the Department. The Department may close the repository at its discretion, based on the factors in 335-14-8-.08(1)(c)2.

(2) Application for a permit.

(a) Any person who requires a permit shall complete, sign, and submit to the Department an application for each permit required under 335-14-8-.01(1).

(b) The Department shall not begin the processing of a permit until the applicant has fully complied with the requirements for that permit as set out in the applicable portions of 335-14-8.

(c) Permit applications must comply with the signature and certification requirements of 335-14-8-.02(2).

(d) The Department shall review for completeness every application for a permit. Upon completing the review, the Department shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Department shall list the information necessary to make the application complete. The Department shall specify in the notice of deficiency a date for submitting the necessary information. The Department may request any information necessary to clarify, modify, or supplement previously submitted material but requests for items not required by Rules 335-14-8-.02 or 335-14-8-.13 will not render an application incomplete.

(e) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement action may be taken.

(3) Modification, revocation and reissuance or termination of permits.

(a) Permits may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Department's initiative. However, permits may only be modified, revoked and reissued, or terminated for the reasons specified in 335-14-8-.04(2) or (4). All requests shall be in writing and shall contain facts or reasons supporting the request.

(b) If the Department decides that the request is not justified, it shall send the requester a brief written response giving a reason for the decision. Denials of such requests are not subject to public notice, comment or hearings.

(c) 1. If the Department tentatively decides to modify or revoke and reissue a permit under 335-14-8-.04(2), it shall prepare a draft permit under 335-14-8-.08(4) incorporating the proposed changes. The Department may request additional information and, in the case of a

modified permit, may require the submission of an updated application. In case of revoked and reissued permits, the Department shall require the submission of a new application.

2. In a permit modification under 335-14-8-.08(3), only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under 335-14-8-.08(3), the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

3. Minor modifications as defined in 335-14-8-.04(3) are not subject to the requirements of 335-14-8-.08(3).

(d) If the Department tentatively decides to terminate a permit under 335-14-8-.04(4), it shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures of any draft permit prepared under 335-14-8-.08(4).

(4) Draft permits.

(a) Once an application is complete, the Department shall tentatively decide whether to prepare a draft permit or deny the application.

(b) If the Department tentatively decides to deny the permit application, it shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit prepared under 335-14-8-.08(4). If the Department's final decision is that the tentative decision to deny the permit application was incorrect, it shall withdraw the notice of intent to deny and proceed to prepare a draft permit under 335-14-8-.08(4)(c).

(c) If the Department decides to prepare a draft permit, it shall prepare a draft permit that contains the following information:

1. All conditions under 335-14-8-.03(1) and (3);
2. All compliance schedules under 335-14-8-.03(4);
3. All monitoring requirements under 335-14-8-.03(2); and
4. Standards for treatment, storage or disposal and other permit conditions under 335-14-8-.03(1).

(d) Draft permits prepared under 335-14-8-.08(4) shall be accompanied by a fact sheet if required under 335-14-8-.08(5).

(5) Fact sheet.

(a) A fact sheet shall be prepared for every draft permit for a major HWM facility and for every draft permit that the Department finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The Department shall send this fact sheet to the applicant and, upon request, to any other person.

(b) The fact sheet shall include when applicable:

1. A brief description of the type of facility or activity which is the subject of the draft permit;
 2. The type and quantity of wastes which are proposed to be or are being treated, stored, or disposed of;
 3. A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions;
 4. Reasons why any requested variances or alternatives to required standards do not appear justified;
 5. A description of the procedures for reaching a final decision on the draft permit including:
 - (i) The beginning and ending dates of the comment period under 335-14-8-.08(6) and the address where comments will be received;
 - (ii) Procedures for requesting a hearing or the date and time of the hearing if scheduled at the time the draft permit is issued, and the nature of the hearing;
 - (iii) Any other procedures by which the public may participate in the final decision; and
 6. Name and telephone number of a person to contact for additional information.
- (6) Public notice of permit actions and public comment period.
- (a) Scope.
1. The Department shall give public notice that the following actions have occurred:

- (i) A permit application has been tentatively denied under 335-14-8-.08(4)(b);
 - (ii) A draft permit has been prepared under 335-14-8-.08(4)(c); or
 - (iii) A hearing has been scheduled under 335-14-8-.08(8).
2. No public notice is required when a request for permit modification, revocation and reissuance, or termination is denied under 335-14-8-.08(3)(b). Written notice of the denial shall be given to the requester and to the permittee.
3. Public notices may describe more than one permit or permit action.
- (b) Timing.
1. Public notice of the preparation of a draft permit required under 335-14-8-.08(6)(a) shall allow at least 45 days for public comment.
2. Public notice of a public hearing shall be given at least 30 days before the hearing. (Public notice of the hearing may be made in the notice in 335-14-8-.08(6) (b)1.)
- (c) Public notice of activities described in 335-14-8-.08(6)(a)1. shall be given by the following methods:
1. By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under 335-14-8-.08(6)(c) may waive his right to receive notice):
- (i) The applicant;
 - (ii) Any other agency which the Department knows has issued or is required to issue a RCRA, UIC, PSD, NPDES or 404 permit for the same facility or activity;
 - (iii) Federal and State of Alabama agencies with jurisdiction over fish, shellfish, and wildlife resources and over coastal zone management plans, the Advisory Council on Historic Preservation, State of Alabama Historic Preservation Officers, including any affected States (Indian Tribes). (For purposes of 335-14-8-.08(6)(c), and in the context of the Underground Injection Control Program only, the term State includes Indian Tribes treated as States.)
 - (iv) Persons on a mailing list developed by:
 - (I) Including those who request in writing to be on the list;
 - (II) Soliciting persons for area lists from participants in past permit proceedings in that area; and

(III) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State of Alabama funded newsletters, environmental bulletins, or State of Alabama law journals. The Department may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Department may delete from the list the name of any person who fails to respond to such a request; and

(v) (I) To any unit of local government having jurisdiction over the area where the facility is proposed to be located; and

(II) To each State of Alabama agency having any authority under State of Alabama law with respect to the construction or operation of such facility.

2. Publication of a notice in a daily or weekly major local newspaper of general circulation and broadcast over local radio stations.

3. Any other method reasonably calculated to give actual notice of the action in question to persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(d) Contents.

1. All public notices issued under 335-14-8-.08 shall contain the following minimum information:

(i) Name and address of the office processing the permit action for which the notice is being given;

(ii) Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit;

(iii) A brief description of the business conducted at the facility or activity described in the permit application;

(iv) Name, address, and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit, fact sheet, and the application; and

(v) A brief description of the comment procedures required by 335-14-8-.08(7) and (8) and the time and place of any hearing that will be held, including a statement of procedures to

request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and

(vi) Demographic data on race, color, national origin, and income within three circular areas the center point of which is the facility and the radii of which are 0.5 miles, 1.0 miles, and 3.0 miles.

2. In addition to the general public notice described in 335-14-8-.08(6)(d)1., of the public notice for a hearing under 335-14-8-.08(8) shall contain the following information:

- (i) Reference to the date of previous public notices relating to the permit;
- (ii) Date, time, and place of the hearing; and
- (iii) A brief description of the nature and purpose of the hearing, including applicable rules and procedures.

(e) A brief description of the nature and purpose of the hearing, including applicable rules and procedures. In addition to the general public notice described in 335-14-8-.08(6)(d)1., all persons identified in 335-14-8-.08(6)(c)1.(i), (ii), and (iii), shall be mailed a copy of the fact sheet, the permit application and the draft permit. Upon determination of the number of these persons, the Department will inform the applicant in writing of that number and the applicant shall provide sufficient copies of the permit application to the Department as requested.

(7) Public comments and request for public hearings.

During the public comment period provided under 335-14-8-.08(6), any interested person may submit written comments on the draft permit and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in 335-14-8-.08(11).

(8) Public hearings.

(a) 1. The Department shall hold a public hearing whenever it finds, on the basis of requests, a significant degree of interest in a draft permit(s);

2. The Department may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision;

3. The Department shall hold a public hearing whenever it receives written notice of opposition to a draft permit and a request for a hearing within 45 days of public notice under 335-14-8-.08(6)(b)1.;

4. The Department shall hold a public hearing on all proposed disposal facility permits;

5. Whenever possible the Department shall schedule a hearing under 335-14-8-.08(8) at a location convenient to the nearest population center to the proposed facility;

6. Public notices of the hearing shall be given as specified in 335-14-8-.08(6).

(b) Any person may submit oral or written statements or data concerning the draft permit. Reasonable time limits may be set upon the time allowed for oral statements and the submission of statements in writing may be required. The comment period will automatically extend to the close of any public hearing under 335-14-8-.08(8). The hearing officer may also extend the comment period by so stating at the hearing.

(c) A written transcript of the public hearing shall be available for public inspection.

(9) Obligation to raise issues and provide information during the public comment period.

All persons, including applicants, who believe that any condition of a draft permit is inappropriate or that the Department's tentative decision to deny an application, terminate a permit or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period. Any supporting materials which are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State of Alabama or federal statutes or regulations, Department documents of general applicability or other generally available reference materials. Commenters shall make supporting documents not already included in the administrative record available to the Department as it shall direct.

(10) Reopening of the public comment period.

(a) 1. The Department may order the comment period reopened if the procedures of 335-14-8-.08(10)(a) could expedite the decision making process. When the public comment period is reopened under 335-14-8-.08(10)(a), all persons, including applicants, who believe any

addition of a draft permit is inappropriate or that the Department's tentative decision to deny an application, terminate a permit or prepare a draft permit is inappropriate must submit all reasonable available factual grounds supporting their position, including all supporting material, by a date, not less than sixty days after public notice under 335-14-8-.08(10)(a)2., set by the Department. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than twenty days after the date set for filing of the material, set by the Department.

2. Public notice of any comment period under 335-14-8-.08(10)(a) shall identify the issues to which the requirements of 335-14-8-.08(10)(a) apply.

(b) If any data, information, or arguments submitted during the public comment period, including information or arguments required under 335-14-8-.08(9), appear to raise substantial new questions concerning a permit, the Department may take one or more of the following actions:

1. Prepare a new draft permit, appropriately modified, under 335-14-8-.08(4);

2. Prepare a revised fact sheet under 335-14-8-.08(5) and reopen the comment period under 335-14-8-.08(10); or

3. Reopen or extend the comment period under 335-14-8-.08(6) to give interested persons an opportunity to comment on the information or arguments submitted.

(c) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice under 335-14-8-.08(6) shall define the scope of the reopening.

(d) Public notice of any of the actions in 335-14-8-.08(10) shall be given as specified in 335-14-8-.08(6).

(11) Response to comments.

(a) At the time any final permit is issued, the Department shall issue a response to comments. This response shall:

1. Specify which provisions, if any, of the draft permit have been changed in the final permit and the reasons for the change; and

2. Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(b) The response to comments shall be available to the public.

(12) Issuance of permit.

After the close of the public comment period under 335-14-8-.08(6) on a draft permit, the Department shall issue a final permit decision [or a decision to deny a permit for the active life of a AHWMMMA hazardous waste management facility or unit under 335-14-8-.02(20)].

(13) Severability.

If an appeal of a final permit decision under 335-14-8-.08(12) is sought under Code of Alabama 1975, § 22-22A-7 and a portion of the permit decision is stayed as provided in Code of Alabama 1975, § 22-22A-7(c)(4):

(a) Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions;

(b) All other provisions shall remain fully effective and enforceable; and

(c) Existing facilities shall remain subject to the interim status permit standards in Chapter 335-14-6 in lieu of any stayed provisions.



Current as of: July 2, 2003

Dear APPLICANT:

This is an application package for EPA financial assistance programs. A PDF read-only version and a Wordperfect version may be found on the EPA Region 4 Grants Management Office Homepage, which may be accessed at:

<http://www.epa.gov/region4/grants>

If you have problems accessing our web site, please contact Harriet Yancey at 404-562-8408.

If you have questions about the assistance program for which you are applying or need help in completing your application, please contact the Grants Management Office at 404/562-8400 or one of the following Grants Specialists at 404/562-xxxx:

**Hector Buitrago - 8397
Elaine Curles - 8364
Christine McKay - 8414
Shirley Grayer - 8416
Elaine Lewis - 8422**

**Tracy Shellhorse - 8411
Ethelreen Murdix - 8426
Ralph Robinson - 8418
Stephanie Lankford - 8423**

Applications should be submitted at least sixty (60) days prior to the expected date of award. Your completed original application and one copy should be mailed to:

**GRANTS MANAGEMENT OFFICE
ENVIRONMENTAL PROTECTION AGENCY
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GA 30303-8960**



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Envirofacts Report on Non-Construction Grants

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AL DEPT OF ENVIRONMENTAL MANAGEMENT (Grant #: 004009040)
1400 COLISEUM BLVD
MONTGOMERY, AL 36110

Project Information

CFDA Number: 66.801
CFDA Description: HAZARDOUS WASTE MGT. STATE PROG. SUPPORT
Project Description: HAZARDOUS WASTE MANAGEMENT PROGRAM (RCRA)
Project Start Date: OCT-01-2003
Project End Date: SEP-30-2004
Total Project Cost: \$4,589,289
Project Location (City, State, County): , AL,
Project Manager: WM. GERALD HARDY
Project Phone:

EPA Information

EPA Program: HAZARDOUS WASTE MANAGEMENT STATE PROGRAM SUPPORT
Statutory Authority: SOLID WASTE DISPOSAL ACT: SEC. 3011
EPA Project Officer Name: GAIL MIDDLEBRO
EPA Project Officer Phone: 4045628494
EPA Cumulative Award: \$2,628,396

Amendments

Amendment#	Award Date	Funds Awarded
004009041	MAY-18-2004	\$1,220,363

Environmental Perspective 2003

EXHIBIT

H

Alabama Department of
Environmental Management

5



1	B			C		D	E	G	H	I	M	N	AH
	Facility	Address	City	County	Zip	Latitude	Longitude	Fugitive Air Emissions	Point Source Air Emissions			Total Air Emissions	
2	ALABAMA POWER CO. GREENE COUNTY STEAM PLANT	HWY. 43 & COUNTY RD. 18	FORKLAND	GREENE	36740			0	7474243			7474243	
3	ALABAMA POWER CO. GASTON STEAM PLANT	HWY 25	WILSONVILLE	SHELBY	35186			0	6659664			6659664	
4	U.S. TVA COLBERT FOSSIL PLANT	900 COLBERT STEAM PLANT RD	TUSCOMBIA	COLBERT	35987	34.7458	87.8500	2282	3327130			3327130	
5	ALABAMA POWER CO. BARRY STEAM PLANT	US HWY. 43	BUCKS	MOBILE	36512			0	3237097			3237097	
6	U.S. TVA WIDOWS CREEK FOSSIL PLANT	COUNTY RD. 96	STEVENS	JACKSON	35772	34.8669	85.8342	807	3232528			3232528	
7	ALABAMA POWER CO. GORGAS STEAM PLANT	460 GORGAS RD.	PANFISH	WALKER	35580			995	2662363			2662363	
8	INTERNATIONAL PAPER COURTLAND MILL	COUNTY RD. 150	COURTLAND	LAWRENCE	35918	34.7113	87.3094	53267	1593960			1593960	
9	INTERNATIONAL PAPER CO. RIVERDALE MILL	100 JENSEN RD.	PRATTVILLE	WILCOX	36067	31.4361	86.4680	10514	1610293			1610293	
10	Weyerhaeuser Co.	7816 HWY. 10 W.	PRATTVILLE	WILCOX	36067	31.4361	86.4680	10514	1554540			1554540	
11	Solutia Inc.	1050 CHENISTRAND AVE	DECATUR	MORGAN	35601	34.6339	87.0244	85201	1386086			1386086	
12	MEAD COATED BOARD INC.	ALABAMA HWY. 165	COTTONTON	RUSSELL	35851	32.3878	85.1008	8905	1351435			1351435	
13	ALA. ELEC. COOP. CHARLES R. LOWMAN POWER PLANT	CARSON RD.	LEROY	WASHINGTON	35548			20	1328180			1328180	
14	BP AMOCO CHEMICALS	1401 FINLEY ISLAND RD.	DECATUR	MORGAN	35601	34.6500	87.0542	529552	757597			757597	
15	ALABAMA RIVER PULP CO. INC.	COUNTY RD. 39 OFF U.S. HWY. 84	PERDUE HILL	MONROE	36470	31.5465	87.5152	62010	1146202			1146202	
16	CONTAINER CORP. OF AMERICA	3224 HWY. 31 S.	BREWTON	ESCAMBIA	36426	31.1014	87.0755	18860	1162923			1162923	
17	ALABAMA POWER CO. MILLER STEAM ELEC. PLANT	1620 PORTER RD.	QUINTON	JEFFERSON	35130			0	1137308			1137308	
18	SNIPPERT STONE CONT. STEVENSON MILL	400 COUNTY RD. 85	STEVENS	JACKSON	35772	34.8560	85.7833	35326	1007720			1007720	
19	GEORGIA PACIFIC CORP. NAHEOLA MILL	7530 HWY. 14	SELMA	DALLAS	39702	32.4208	86.8754	16260	999067			999067	
20	INTERNATIONAL PAPER CO. RIVERDALE MILL	101 MARKET ST. N.E.	DECATUR	MORGAN	35602	34.6047	86.9675	741000	1017327			1017327	
21	BUNGE N.A. INC.	4865 SECOND ST.	DECATUR	COLBERT	35602	34.7453	87.7007	95183	827897			827897	
22	WASE ALLOYS L.L.C. ALLOYS PLANT	1008 FORD RD.	MUSCLE SHOALS	WASHINGTON	35661	34.7598	87.7007	44163	836711			836711	
23	REYNOLDS METALS CO. SHEFFIELD PLANT	1008 FORD RD.	SHEFFIELD	WASHINGTON	35653	31.2011	87.9846	44163	836711			836711	
24	CIBA SPECIALTY CHEMICAL CORP.	1008 FORD RD.	MUSCLE SHOALS	TALADEGA	35644	33.3164	86.3556	17600	79846			79846	
25	ALLIANCE FOREST PRODUCTS U.S.	1008 FORD RD.	MUSCLE SHOALS	TALADEGA	35651	34.7282	87.8956	721475	0			721475	
26	REYNOLDS METALS COMPANY ALABAMA RECLAMATION PLANT	1008 FORD RD.	MUSCLE SHOALS	TALADEGA	35651	34.7282	87.8956	721475	0			721475	
27	GULF STATES PAPER CORP. DEMOPOLIS PLANT	307 W. INDUSTRIAL RD.	JACKSON	COLBERT	35601	34.7282	87.8953	42347	512018			512018	
28	BOISE CASCADE CORP.	307 W. INDUSTRIAL RD.	JACKSON	COLBERT	35601	34.7282	87.8953	42347	435018			435018	
29	SONY MAGNETIC PRODS. INC. OF AMERICA	4275 W. MAIN ST.	DOYHAN	LOUSE	35058	31.2167	85.4553	42370	10630			10630	
30	U.S. ARMY ANNISTON ARMY DEPOT	7 FRANKFORD AVE. DRK (BUILDING 1)	ANNISTON	CALHOUN	36301	33.6500	85.9728	40473	412221			412221	
31	OWENS CORNING HT INC.	908 OWENS CORNING DR.	PHENIX CITY	RUSSELL	36869	32.4322	84.9769	281300	115500			115500	
32	QUANTEGY INC.	2230 MARYN PKY	OPHELIA	LEE	36803	32.6222	85.3662	333186	42704			42704	
33	ALABAMA POWER CO. GADSDEN STEAM PLANT	1000 GOODYEAR AVE	GADSDEN	ETOWAH	35903			0	313790			313790	
34	HALDEX BRAKE PRODUCTS CORP. FRICTION PRODUCTS DIV.	101 ECHLIN BLVD	PRATTVILLE	ALABAMA	36097	32.4333	86.4750	179077	113664			113664	
35	NICHOLS ALUMINUM ALABAMA	2201 HWY. 20 W.	DECATUR	MORGAN	35601	34.6150	87.0128	25133	256061			256061	
36	LOPAREX INC.	1628 BURGUNDY LN. N.W.	CULLMAN	CULLMAN	35055	34.2011	88.8511	665	275400			275400	
37	MOBILE ENERGY SERVICES L.L.C.	200 BAY BRIDGE RD.	MOBILE	MOBILE	36610	30.7383	88.0489	0	267910			267910	
38	3M COMPANY	6675 U.S. HWY. 43	GUIN	MARION	35553	33.0858	87.8866	8	246880			246880	
39	JVC MAGNETICS AMERICA CO	1 JVC RD.	TUSCALOOSA	MARION	35405	33.1747	87.4563	246273	0			246273	
40	GENERAL ELECTRIC CO	PLASTICS DR.	BURKVILLE	TUSCALOOSA	35405	33.1747	87.4563	246273	0			246273	
41	KNAUF FIBER GLASS GMBH	HUGULEY INDUSTRIAL PARK 3502 43RD ST	LANETT	LOUNDS	36752	32.3270	86.4905	203553	12275			12275	
42	PRAXIS INDUS. LLC - HAMILTON BATHWARE	2291 MILITARY ST. S.	HAMILTON	CHAMBERS	35670	32.8339	85.2172	2257	225743			225743	
43	SLOSS INDUS. CORP. CHEMICAL	4300 F.L. SHUTTLESWORTH DR	BIRMINGHAM	MARION	35207	33.5760	86.7917	0	213920			213920	
44	BORAL BRICKS INC. BESSMER PLANT 5	VULCAN RD.	BESSMER	JEFFERSON	35222	33.4078	87.0181	0	213548			213548	
45	HENDERSON BLACK & GREENE INC. PERMACAST	110 PKE ST.	TEBO	JEFFERSON	35261	31.7917	85.9697	0	203312			203312	
46	KOHLER CO.	176 COCHRAN RD.	MUNTSVILLE	MADISON	35824	34.6898	86.7508	90000	100000			100000	
47	BORAL BRICKS INC. BESSMER PLANT 6	HOPWELL RD.	BESSMER	JEFFERSON	35821	34.6898	86.7508	90000	183023			183023	
48	MERCEDES-BENZ U.S. INTL. INC.	1 MERCEDES DR.	VALENCIA	TUSCALOOSA	35490	33.4494	86.9764	42755	138355			138355	
49	HONDA MFG. OF ALABAMA L.L.C.	1800 HONDA DR.	LEICOLN	TALADEGA	35696			14122	166174			166174	
50	VULCAN PIPE & STEEL COATINGS INC.	2400 WOODARD RD	BESSMER	JEFFERSON	35020			178881	0			178881	
51	MDA MFG. INC.	905 STATE DOCKS RD	DECATUR	MORGAN	35601	34.6417	87.0361	57120	115020			115020	
52													

	AI	AJ	AK	AL	AM	AN	AO	County	AQ	AR	AS	AT	AU	AV	AW	AX	AY	AZ	1.0 Miles	BA	BB	BC	BD	BE	BF
1	Density	Households	Minority	Income	Poverty	Density	Households	Minority	Income	Poverty	Density	Households	Minority	Income	Poverty	Density	Households	Minority	Income	Poverty	Density	Households	Minority	Income	
2	87.64	1737080	29.7	22.5	15.7	15.44	3931	81.4	40.8	34.0	13.52	135	74.1	43.7	26.0	13.86	15	75.6	45.0	26.2	13.89	4	75.2	44.1	
3	87.64	1737080	29.7	22.5	15.7	36.40	15640	14.4	29.1	18.2	9.02	1038	20.4	30.8	16.6	119.02	147	17.5	28.2	15.9	118.17	37	17.5	28.2	
4	87.64	1737080	29.7	22.5	15.7	92.48	22461	19.0	23.1	13.8	26.81	1038	20.4	28.9	20.5	36.40	47	15.9	28.1	17.0	43.36	12	13.7	24.7	
5	87.64	1737080	29.7	22.5	15.7	324.26	150179	37.5	23.3	18.1	50.40	489	31.5	22.9	14.3	47.73	51	68.7	41.2	26.2	47.54	13	93.8	55.5	
6	87.64	1737080	29.7	22.5	15.7	49.99	21615	8.7	22.4	13.5	76.54	792	8.4	22.4	15.6	92.99	102	7.1	23.5	18.8	103.82	28	6.6	24.0	
7	87.64	1737080	29.7	22.5	15.7	89.02	28364	8.5	26.2	16.2	42.45	474	3.2	21.2	10.3	43.32	53	3.9	18.2	8.8	44.88	14	4.1	18.6	
8	87.64	1737080	29.7	22.5	15.7	50.19	13538	20.4	16.1	10.8	309.26	3227	56.1	29.5	24.3	17.17	17	63.6	36.7	25.3	17.37	4	63.6	30.7	
9	87.64	1737080	29.7	22.5	15.7	73.28	16003	22.7	24.5	15.1	25.61	228	56.1	18.3	12.9	185.45	219	27.7	27.0	22.8	56.85	16	22.0	30.7	
10	87.64	1737080	29.7	22.5	15.7	14.83	4776	16.9	18.5	12.1	58.42	5208	51.4	27.2	21.6	417.21	386	91.1	62.7	51.9	16.91	4	91.1	62.7	
11	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
12	87.64	1737080	29.7	22.5	15.7	17.58	19741	43.4	28.5	20.4	10.80	115	42.7	32.6	18.3	8.95	11	62.7	43.9	18.3	8.45	3	37.4	32.4	
13	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
14	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
15	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
16	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
17	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
18	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
19	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
20	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
21	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
22	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
23	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
24	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
25	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
26	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
27	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
28	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
29	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
30	87.64	1737080	29.7	22.5	15.7	16.75	6705	35.4	27.4	18.4	112.27	1187	46.1	31.9	23.7	63.84	71	40.1	22.8	16.5	386.01	91	71.6	43.4	
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ADEM

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

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JAMES W. WARR

DIRECTOR

BOB RILEY

GOVERNOR

October 19, 2004

MEMORANDUM

TO : Dr. William M. Sanders, Chairman
Environmental Management Commission

JWW FROM : James W. Warr
Director

SUBJECT: Petition for Rulemaking to Amend Administrative Code Rules
335-3-14-.01, 335-3-15-.05, 335-3-6-.21, 335-13-5-.03, and
335-14-8-.08

The Department has conducted an initial review of the rulemaking petition referenced above submitted by Mr. David Ludder. Based upon that review the Department offers the following observations.

Demographic data such as proposed would be more appropriate for those making siting decisions. Siting marks the beginning of a process that may ultimately involve an environmental permit but is not a function of the Department. Decisions to establish industrial parks, and subsequently recruit tenants, or to site an individual facility, are made at the local level. Providing demographic data to local authorities could be of assistance to them in making those decisions.

The petition rationale makes reference to previous allegations of discrimination filed in connection with permitting actions and, while acknowledging no findings in this regard, suggests that more complaints are likely to be filed in the future. Similarly, the petition suggests possible injury to the petitioners and placement of federal grants received by the Department in jeopardy. It is not clear how the proposed rule changes would address these potentialities unless the intent is to make demographics a part of the environmental permit decision making process.



Facsimiles: (334)

Administration: 271-7950
General Counsel: 394-4332

Air: 279-3044

Land: 279-3050

Water: 279-3051

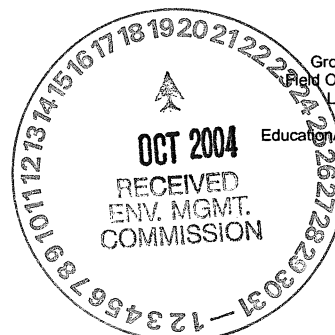
Groundwater: 270-5631

Field Operations: 272-8131

Laboratory: 277-6718

Mining: 394-4326

Education/Outreach: 394-4383



MEMORANDUM
Page Two
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The Department is not aware of any basis in the Environmental Management Act, or any of the individual state environmental laws administered by the Department, for consideration of demographics in permitting decisions. The same is true for federal environmental laws which are implemented by the Department pursuant to state law. Environmental quality standards, which are demographically neutral and are established to protect human health and the environment, are the statutorily recognized criteria for permitting decisions.

The role of demographics in a simple renewal of an existing permit is even less clear. In such instances, the facilities affected are existing based on earlier siting decisions, and they are operating pursuant to environmental permits issued consistent with applicable environmental quality standards. It is not readily apparent what role demographics are intended to play in such an instance, particularly if the demographics in the vicinity of the permit holder have changed over time.

Finally, if the Department proposes to modify the permit for an existing facility, usually to incorporate new regulatory requirements necessitated by a change in environmental standards of a more restrictive nature, it is not clear how demographics are a factor. As was the case with a simple renewal, the demographics in the vicinity of the permit holder could have changed over time.

While the Department has not had the opportunity to review the fairly voluminous materials associated with the rulemaking petition in detail, our findings indicate that there are questions that need to be answered. These include, but are not limited to: (1) the intent of the proposal; (2) where siting decisions should be made; (3) how the proposal relates to the scope of the Department's authority; (4) the expected changes in permitting processes should the regulation changes be adopted; and (5) the relationship, if any, between this petition and the action taken at the last Commission meeting to refer the report previously presented by Mr. Ludder to the Rulemaking Petition Subcommittee.

The Department submits that these questions are factors to be considered consistent with the Commission's regulations governing receipt and subsequent disposition of rulemaking petitions and that these questions and others should be answered before considering rulemaking. By virtue of the

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manner in which Mr. Ludder formulated his petition and the time constraints on the Commission to take action, it is recommended that the petition be denied. The Commission's initiative to refer Mr. Ludder's previous report to the Rulemaking Petition Subcommittee for analysis can then be renewed. A suggested order which incorporates this recommended course of action is attached.

JWW/rdg

Attachment

cc: Commission Members, w/Attachment

BEFORE THE
ALABAMA ENVIRONMENTAL MANAGEMENT COMMISSION
OF THE
ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:

ALABAMA AFRICAN AMERICAN
ENVIRONMENTAL JUSTICE ACTION
NETWORK; ALABAMA ENVIRONMENTAL
COUNCIL; ALABAMA ENVIRONMENTAL
COUNCIL-HUNTSVILLE CHAPTER; ALABAMA
RIVERS ALLIANCE, INC.; ALABAMA WATCH;
ASHUEST BAR/SMITH AUTHORITY
ORGANIZATION; BLACK WARRIOR RIVER
KEEPER, INC.; CAHABA RIVER SOCIETY, INC.;
CONSERVATION UNLIMITED; FRIENDS OF
LOCUST FORK RIVER; FRIENDS OF RURAL
ALABAMA, INC.; FRIENDS OF RURAL
ALABAMA, INC.; LEGAL ENVIRONMENTAL
ASSISTANCE FOUNDATION, INC.; AND SAND
MOUNTAIN CONCERNED CITIZENS, INC.,

PETITIONERS.

EMC Rulemaking Petition
No. 04-05

ORDER

This cause coming before the Alabama Environmental Management Commission pursuant to the referenced rulemaking petition and after consideration of those factors contained in the Commission's regulations governing such petitions, it is hereby ORDERED:

That the rulemaking petition is denied for the reasons shown in the attached Reasons for Denial; and

That this action has been taken and this Order issued by the Alabama Environmental Management Commission effective October 19, 2004; and

That a copy of this Order shall be served upon the parties either personally or by certified mail, return receipt requested.

Issued this 19th day of October 2004.

APPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

DISAPPROVED:

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

Commissioner

REASONS FOR DENIAL OF RULEMAKING PETITION

The Rulemaking Petition to amend ADEM Administrative Code R. 335-3-14-.01, 335-3-15-.05, 335-3-6-.21, 335-13-5-.03, and 335-14-8-.08, to include certain demographics in permit notices of the Alabama Department of Environmental Management is denied without prejudice for the following reasons:

- (1) The genesis of the Rulemaking Petition is a report filed with the Commission by the Petitioners at the last Commission meeting on August 24, 2004. The Commission voted to refer the report to the Rulemaking Petition Subcommittee to study and subsequently make recommendations to the full Commission. The filing of the petition is premature and has disrupted the process already established.
- (2) The changes sought by the Petitioners, in and of themselves, would not address the issues put forth in the rationale filed in support of the petition.
- (3) The intention of the changes sought with respect to ADEM's permitting process is not clear and may exceed the Department's statutory authority.
- (4) The manner in which the proposed changes would affect the Department's overall regulatory scheme is not apparent.

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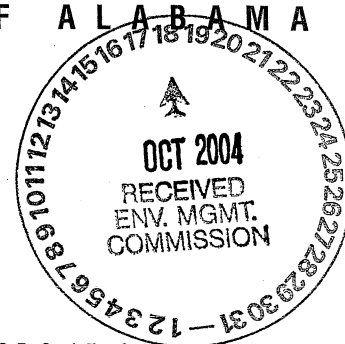
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BUSINESS COUNCIL
OF ALABAMA

October 18, 2004

Alabama Environmental Management Commission
c/o Ms. Debi Thomas, Executive Assistant
1400 Coliseum Boulevard
Montgomery, AL 36110-2059



RE: Petition to Amend ADEM Administrative Code Rules 335-3-14-.01, 335-3-15-.05,
335-6-6-.21, 335-13-5-.03, and 335-14-8-.08

Dear Gentlemen:

On September 21, 2004, the Alabama Environmental Management Commission ("AEMC" or "Commission") received a rulemaking petition entitled "Petition to Amend ADEM Admin. Code R. 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08." This petition was filed by David Ludder, of the Florida-based Legal Environmental Assistance Foundation ("LEAF"), on behalf of approximately one dozen environmentalist groups (collectively, the "petitioners") and is hereafter referred to as "the petition."

The petition seeks to amend sections of the Alabama Department of Environmental Management's ("ADEM") regulations so identified (which address the permitting requirements for National Pollutant Discharge Elimination System ("NPDES") water permits, solid waste management permits, air permits, and hazardous waste management permits) to require ADEM to publish "demographic data on the race, color, national origin and income of the populations surrounding the facilities to be permitted" in each public notice of initial permit issuance, permit reissuance, and permit modification. The Business Council of Alabama ("BCA") strongly encourages the AEMC to deny the petition and offers the comments contained in this letter in support of its position.

I. The petitioners' proposed rules would be illegal.

A. ADEM lacks the statutory authority to develop or collect such demographic data.

The petition identifies five regulations for amendment. Each of these regulations arises from its own specific legislatively-enacted statute(s). It is those statutes that establish the parameters of ADEM's permitting of the activities at issue. *None* of those statutes authorize ADEM to develop or collect demographic data with respect to permitting activities. Nor do any

of those statutes enable ADEM to require a permit applicant to develop or collect such data in its stead.

Even the most generalized statements of ADEM's authority, such as those found in the provisions of the Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 through -16, do not provide the authority to undertake or require such demographic research efforts. Rather, those sections speak in general terms of ADEM promulgating rules, regulations, and standards to "carry out the provisions and intent of this chapter." See Ala. Code § 22-22A-5(2). Importantly, the AEMA's statement of such legislative intent found in Ala. Code § 22-22A-2 speaks in terms of "*the* citizens of the state," "*all* citizens of the state," and "*the* people" (emphasis added). There is absolutely no discussion of any desire by the legislature that the AEMA provide heightened or extraordinary environmental protection or analysis based on race, creed, national origin, skin color, or socio-economic background. To suggest such a prejudiced and discriminatory outlook would have been as repugnant in the year of the AEMA's enactment (1982) as it is today. Rather, the legislature's clear intent was that ADEM provide equal protection to *the* people and *all* citizens of the state.

The lack of a statutory mandate for these proposed regulations is fatal. "If an agency promulgates rules or acts outside its jurisdictional limits as established by the enabling statute, the agency is said to be functioning *ultra vires*. . . . It is settled law that the provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation." *Kids' Club, Inc. v. State Department of Human Resources*, 874 So. 2d 1075, 1090 (Ala. Civ. App. 2003) (internal citations omitted). In the instant case, ADEM would be acting in an illegal *ultra vires* manner to promulgate a regulation requiring the collection of such data.

B. Petitioners proper recourse is either the Alabama Legislature or the United States Environmental Protection Agency.

Petitioners' likely goal in seeking demographic information is likely to place limitations or restrictions on the location of industrial facilities based solely on the surrounding communities' socio-economic status. Social engineering of that magnitude is well beyond the scope of ADEM's regulatory purview. Given the lack of statutory authority for such efforts currently in place, the proper forum for such efforts is, of course, the legislature. Furthermore, if petitioners truly believe that ADEM is violating federal law and discriminating against minority communities with respect to its permitting decisions, then they have an avenue of redress: filing an environmental justice complaint with the United States Environmental Protection Agency ("EPA"). Indeed, petitioners are well aware of this avenue, having done so in the past (and, it should be noted, failing to convince that agency that any such discrimination exists).

II. In addition to being extra-statutory and illegal, the petitioners' proposed rules are harmful at worst and impractical at best.

A. Petitioners' proposed rulemaking would have a chilling effect on industrial development in Alabama.

Petitioners' ultimate goal is to essentially zone huge swathes of Alabama as areas that require heightened environmental scrutiny based solely on the race or economic status of their residents. Ironically, those particular areas are, in many cases, the same areas that sorely need economic development. Economic recruitment efforts, however, are increasingly competitive (as Alabama's failure to secure the prospective Nissan and Boeing plants have demonstrated in the recent past). Heightened layers of unnecessary bureaucratic hurdles unrelated to human health will only cause such companies to continue to locate elsewhere. These communities need economic development; they do not need hurdles to it.

The example of Hyundai's Hope Hull facility is particularly telling. Recall that it is located in the same type of demographic area that petitioners are implying is being unjustly burdened by the types of air and water permits that Hyundai holds. The petition makes no mention, of course, of the 2,000 people employed by Hyundai or the hundreds more employed by Hyundai's suppliers' facilities throughout Alabama's Black Belt. Nor does it admit that the imposition of such pointless demographic analysis requirements – and the hostile signals that they send – could have easily steered Hyundai to Mississippi, Kentucky, or Ohio. At the time, those states were offering stiff competition for the new plant. Importantly, none of those states possess environmental justice statutes or regulations of the sweep proposed by petitioners.

B. The petition's proposed rules would impose significant administrative burdens on ADEM.

Although the costs of collecting such demographic data are unclear, they would likely be significant. Unfortunately, ADEM's funding difficulties are well documented. The ADEM Reform Coalition, a group whose members include several of the petitioners, recognizes that unfortunate fact. As the Coalition has noted, "ADEM is currently ranked very low among southeastern states in state funding for environmental protection . . . ADEM must have sufficient state funding in order to successfully implement its environmental and regulatory programs." ADEM Reform Coalition, *For the People, By the People: A Blueprint for Reform of the Alabama Department of Environmental Management* (February 2003), 25. The Alabama Environmental Management Commission apparently agrees. "The most consistent theme from all the [Environmental Stakeholder Committee] and town hall meetings was the need for additional and more stable funding for ADEM. In the wake of the current State fiscal crisis, ADEM has received severe funding cuts and further cuts are expected." Alabama Environmental Management Commission, *Final Strategic Plan for the Alabama Environmental Management Commission and the Alabama Department of Environmental Management* (April 20, 2004), 5.

In the face of such funding difficulties, it is unclear from where ADEM would marshal the resources to collect and analyze such demographic data. Admittedly, a portion of such costs (particularly with respect to the collection of data) are often passed along to the permit applicants either directly (in the form of increased permit fees) or indirectly (in the form of requiring the permit applicants to collect and provide the data themselves). Perhaps ADEM would think to do so in this case. As noted above, however, ADEM lacks the statutory authority to impose such costs on permit applicants and should not expect to do so without significant legal challenge.

Regardless of the funding mechanism to be employed, the question of “*how* to fund the collection of such data” should not overshadow an even more compelling question: “*why* fund the collection of such data.” *None* of the permitting programs referenced in the petition require or even authorize ADEM to consider demographic factors in its permitting decision. Clearly the intent of those programs is to leave such local land-use decisions to local governments. ADEM’s solid waste regulations, for example, require host government approval before ADEM can even consider a solid waste permit application. *See* ADEM Admin. Code R. 335-15-3-.02(1)(a). In short, all that the petition’s requested rules would achieve would be the collection of data that cannot legally influence any of ADEM’s decisions. Serious questions must be asked, therefore, as to why a cash-strapped agency such as ADEM should be required to undertake such an effort.

C. This rulemaking is premature given ongoing efforts to fully explore and examine environmental justice issues.

The Commission is well aware of its constituents’ concerns with matters of environmental justice and equity. Indeed, it suggested, in its Strategic Plan, that ADEM provide a report to the AEMC’s Strategic Planning Standing Committee regarding ways the department could develop “collaborative efforts to find ways to deal with these [environmental justice] issues, including potential changes in law.” *See* Alabama Environmental Management Commission, *Final Strategic Plan for the Alabama Environmental Management Commission and the Alabama Department of Environmental Management* (April 20, 2004), 11. It would be far more logical, of course, to allow ADEM to finish developing this report before short-circuiting that analytical process with a premature rulemaking endeavor.

In a similar vein, Governor Bob Riley established the Black Belt Action Commission on August 12, 2004. Its thirteen committees include committees to address, among other issues, health and community development. These committees will identify and assess problems, set goals, develop and implement solutions, and measure results. If environmental justice is indeed an issue in Alabama’s Black Belt, then this bi-partisan Commission is likely in the best position to identify it and to suggest solutions. As with ADEM’s ongoing study, it is far more logical to let the Black Belt Action Commission take its course.

D. Petitioners’ intent to impose more stringent regulations in certain communities ignores the fact that, under current ADEM regulations, every community receives the same adequate level of protection.

Petitioners’ push for demographic data collection is likely the first step toward layering their constituents’ communities – or at least the communities of those that they perceive to be their constituents – with some extraordinary level of environmental protection beyond that what ADEM affords to other citizens of the state. If so, then the petitioners’ efforts are sorely misplaced. ADEM’s regulations and standards in the areas of air, water, and solid and hazardous waste permitting are designed and implemented to protect human life regardless of the race or socio-economic background of the human at issue.

Equally importantly, these regulations and standards are based upon those of the EPA and implemented pursuant to programs delegated to the state by the EPA. If any doubt existed as to

whether ADEM's land, air, and water programs were not protective of human health – rich or poor, or black, white, or Hispanic – EPA could and would revoke ADEM's authority to administer those programs. Tellingly, if EPA did so, however, it would administer those programs on the same basis that ADEM does – with the understanding and assumption that its environmental standards were equally protective of all citizens regardless of their demographic background.

E. The inadequate “study” and “data” upon which LEAF relies are patently defective.

In support of the Petition, LEAF offers two documents it christens a “study” and “data.” BCA *strongly* encourages the Commission to examine this so-called study and data not to accept petitioners' description of them at face value. Both items are simply advocacy pieces whose deficiencies include a lack of peer review and lack of supporting documentation or citation.

LEAF's “study” entitled “Race, Poverty, and Environmental Burdens: Injustice in Alabama – Part I Municipal Solid Waste Landfills,” for example, is merely a slide show that purports to show that Alabama's landfills are located in rural areas often populated by either minority and/or poor communities. Given the “study's” lack of supporting data or citations, it is difficult, if not impossible, to verify its accuracy or to fully address its contentions. The same criticisms are true of LEAF's publication of data of the so-called “top fifty toxic air pollution sources in Alabama.”

It is possible, however, to state the following about LEAF's “study” of landfill siting in Alabama. First, it ignores the reality that the primary driving force behind landfill site selection is not racial but financial. Landfills are, of course, located where large expanses of land are relatively cheap. Admittedly, landfill companies are not alone in their desire for inexpensive land. Individuals living below the poverty line also desire to live there and, in fact, often move to such locations as an affirmation of that desire. The resulting convergence of landowners is economic reality rather than malicious conspiracy.

Second, LEAF's “study” neglects to examine the other side of the proverbial coin. Property on which a landfill operates is taxed at a higher rate than when left commercially unused. The increased revenues from increased taxes directly benefit the landfill's host government. Furthermore, pursuant to the host government approval process, host municipalities and counties can (and typically do) assess a tipping fee against landfill operators. These fees are often \$1 a ton per waste disposed and thus can generate thousands of dollars each month for cash-strapped municipalities and counties. Host governments can also require, as a condition of local approval, that landfill operators provide complimentary waste collection, hauling, and/or disposal for local citizens. Such measures reduce the proliferation of open dumps in rural and economically depressed areas. Finally, landfill operations provide much-needed local employment in communities where every job counts. BCA struggles to reconcile increased employment, increased tax revenues, increased government funding, and improvements in local sanitation with any sense of “injustice.”

F. EPA's reviews of ADEM's permitting decisions with respect to Title VI compliance have never found a violation.

As the petitioners note in paragraph 18 of the petition, "eight complaints of discrimination under Title VI have been filed against the Alabama Department of Environmental Management with the U.S. Environmental Protection Agency." The petitioners also admit, however, that each of these complaints have been rejected or, at best, remain under review. The absence of any findings of discrimination to date begs the question – what discrimination or injustice are petitioners trying to address or rectify?

III. Petitioners' effort is inconsistent with Title VI of the Civil Rights Act of 1964.

Title VI of the Civil Rights Act of 1964 provides the primary vehicle for environmental justice litigation. It states that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VI, therefore, precludes state environmental agencies that receive federal funding from discriminating in their permitting decisions.

Importantly, there is no presumption – as petitioners apparently presume and would have the Commission presume – that the *mere location* of a facility in such a community represents a violation of federal civil rights law. Rather, successful Title VI plaintiffs must be able to demonstrate that they are the targets of "purposeful, invidious discrimination." See *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 254 F.Supp.2d 486, 495 (D.N.J. 2003), citing *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001). Furthermore, they must "demonstrate that governmental authority implemented the facially neutral policy at issue because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* As courts have recognized, these are very high standards.

Ironically, should ADEM begin to base permitting decisions (and to deny permits) based on the grounds of race, color, or national origin, then ADEM would not only be behaving in an extra-statutory manner but could in fact be in violation of Title VI. Local citizens who would have otherwise economically benefited from a new facility locating into their community would be well within their rights to pursue a Title VI complaint in response to the denial of a permit for such a facility in their community.

IV. The AEMC's procedural response to this rulemaking is inconsistent with prior practice.

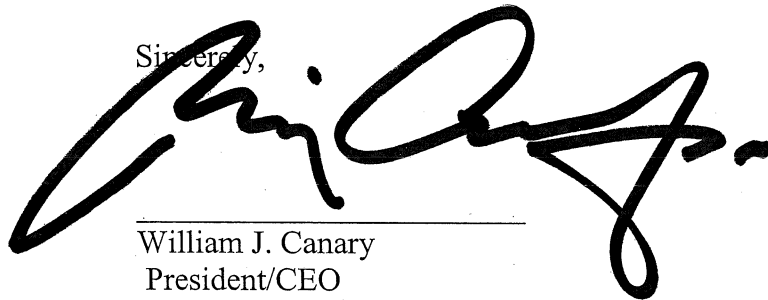
As a final comment, BCA notes that consideration of this petition is on the Commission's agenda for its October 19, 2004, meeting. Curiously, there has been no public notice of any rulemaking subcommittee meeting before that particular Commission meeting. If the lack of publication regarding this meeting means that no such meeting will occur, then the Commission is violating its own procedural regulations with respect to the role of standing committees.

The Commission's rulemaking subcommittee is one of the standing committees established pursuant to ADEM Admin. Code 335-2-3-.09(1)(b). According to that section, "[s]tanding committees may be established at any time for the purposes of considering all questions of a like nature which shall be defined in the motion seeking to establish the standing committee." BCA understands that the Commission resolution which created the rulemaking subcommittee directed that subcommittee to consider all rulemaking petitions.

The Commission's and the rulemaking subcommittee's selective decision to not have this rulemaking petition considered by the subcommittee is inconsistent with prior Commission practice. It was also apparently made outside the purview of the public. BCA respectfully encourages the Commission to take the steps necessary to ensure that it complies with its own regulations and past pattern of practice regarding standing committees and to require that the rulemaking subcommittee consider this petition prior to engaging the entire Commission's time on this matter.

For all of the foregoing reasons, BCA respectfully requests that the AEMC reject the petition or, at the very least, submit it for consideration by the rulemaking subcommittee. If you have any questions regarding BCA's concerns or arguments in this regard, please do not hesitate to contact me.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Bill Canary".

William J. Canary
President/CEO
Business Council of Alabama



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October 18, 2004

271-7150

BY FACSIMILE (334) 270-7706
BY HAND DELIVERY

Alabama Environmental Management
Commission
c/o Ms. Debi Thomas, Executive
Assistant
1400 Coliseum Boulevard
Montgomery, AL 36110-2059



Re: Petition for Rulemaking to Amend ADEM Administrative Code Rules 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08

Dear Gentlemen:

The National Solid Wastes Management Association ("NSWMA") is a trade association representing for-profit companies in North America that provide solid waste collection, recycling and disposal services, and companies that provide professional and consulting services to the waste services industry. NSWMA's members operate in all 50 states and the District of Columbia, including the State of Alabama. NSWMA members in Alabama, like those elsewhere, consist of large publicly-traded companies and both small and large privately-owned companies. All share NSWMA's mission of promoting the management of waste in a manner that is environmentally responsible, efficient, profitable and ethical, while benefiting the public and protecting employees. NSWMA has asked Balch & Bingham to submit this comment letter on the association's behalf with respect to the above-referenced petition for rulemaking. Balch & Bingham now does so.

With particular respect to that petition, the Alabama Environmental Management Commission ("AEMC" or "Commission") received it on September 21, 2004. It was entitled "Petition to Amend ADEM Admin. Code R. 335-3-14-.01, 335-3-15-.05, 335-6-6-.21, 335-13-5-.03, and 335-14-8-.08." This petition was filed by the Florida-based Legal Environmental Assistance Foundation ("LEAF"), on behalf of approximately one dozen environmentalist groups (collectively, the "petitioners"). It is hereafter referred to as "the petition."

The petition requests that the Commission undertake rulemaking to amend certain sections of the Alabama Department of Environmental Management's ("ADEM") regulations. The particular provisions identified (which address the permitting

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requirements for National Pollutant Discharge Elimination System ("NPDES") water permits, solid waste management permits, air permits, and hazardous waste management permits) would be amended so as to require ADEM to publish "demographic data on the race, color, national origin and income of the populations surrounding the facilities to be permitted" in each public notice of initial permit issuance, permit reissuance, and permit modification.

After careful consideration of the petition for rulemaking, NSWMA strongly encourages and recommends that the AEMC to deny the petition and offers the comments contained in this letter in support of its recommendation.

I. Petitioners' Intent to impose more stringent regulations in certain communities ignores the fact that, under current ADEM regulations, every community receives the same adequate level of protection.

Petitioners' desire for the collection of demographic data is likely the first step in an effort to blanket certain communities with an extraordinary level of environmental protection beyond that what ADEM affords to other citizens of the state. If so, then the petitioners' efforts would be better directed elsewhere. ADEM's regulations and standards in the areas of air, water, and solid and hazardous waste permitting are designed and implemented to protect human life regardless of the race or socio-economic background of the human at issue.

Importantly, ADEM's regulations and standards are based upon those of the United States Environmental Protection Agency ("EPA") and implemented pursuant to programs delegated to the state by the EPA. If any doubt existed as to whether ADEM's land, air, and water programs were not protective of human health, EPA would revoke ADEM's authority to administer those programs. Tellingly, if EPA did so, however, it would administer those programs on the same basis that ADEM does – with the understanding and assumption that its environmental standards were equally

II. LEAF's so-called "study" and "data" are wholly insufficient to support its petition.

In support of the petition, LEAF offers two documents it christens a "study" and "data." Both items are simply advocacy pieces, not scientific studies. It is not even clear who prepared them. Their deficiencies include a lack of peer review and lack of supporting documentation or citation. The Commission should take a careful look at these documents before accepting LEAF's assertions regarding their findings at face value.

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For example, LEAF's "study" entitled "Race, Poverty, and Environmental Burdens: Injustice in Alabama – Part I Municipal Solid Waste Landfills," is no study at all. Instead, it is a slide show that, if NSWMA understands it correctly, purports to show that Alabama's landfills are located in rural areas often populated by either minority and/or poor communities. Given the "study's" lack of supporting data or citations, it is difficult, if not impossible, to verify its accuracy or to fully address its contentions.

For example, it is unclear what upon what radius of study LEAF relied in order to draw its conclusions. Based on NSWMA's "ground-truthing" of several of the landfills in question, the association suspects that some such radii must have been significant indeed. For example, NSWMA members have pointed out that several of the identified landfills, such as Pine View Sanitary Landfill in Walker County, are not located near minority communities at all. With respect to the Morris Farm Sanitary Landfill in Lawrence County, the closest resident of any race or socio-economic class is at least three miles away. The Seven Mile Post Road landfill in Limestone County is not even operational yet – it has merely been permitted. Furthermore, in the case of many landfills, nearby residents have actually moved to the landfills after the landfills were permitted and began operations. Such post-landfill population shifts effectively rebut claims that the landfills' permitting efforts capitalized on their proximity to disadvantaged communities.

In all, although such questions make it difficult to address the contentions and allegations that arise from LEAF's study, it is possible to state the following: LEAF's "study" ignores the reality that the primary driving force behind landfill site selection is not racial but financial. Landfills are typically located where large expanses of land can be acquired relatively cheaply. Landfill operators are, of course, not alone in their desire for inexpensive land. Individuals living below the poverty line also desire to live there and, in fact, often exercise their rights to move to such land under their own volition and even after a landfill has commenced operations. The resulting presence of such individuals in the vicinity of landfill operations reflects economic reality rather than malicious conspiracy. NSWMA also points out that, since Alabama's poor and minority populations both unfortunately number above the national average, it is statistically more likely that a landfill in the state might be neighbors – particularly in rural areas or in the state's so-called Black Belt region.

LEAF's "study" also fails to examine the economic benefits of landfill operations to a local community as a whole. In Alabama, property on which a landfill operates is taxed at a higher rate than when left commercially unused. The increased revenues from increased taxes directly benefit the landfill's host government. Furthermore, thanks to the host government approval process, host municipalities and counties can

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(and typically do) assess a tipping fee against landfill operators. These fees can generate thousands of dollars each month for cash-strapped municipalities and counties. Host governments can also require, as a condition of local approval, that landfill operators provide complimentary waste collection, hauling, and/or disposal or other services – such as road maintenance – for local citizens. Such measures reduce the spread of open dumps in rural and economically depressed areas – an outcome that dovetails with ADEM's initiative directed against such open dumps. Finally, landfill

III. The petition's proposed rules would place an undue and significant burden on ADEM.

The costs of collecting such demographic data would likely be significant and thus costly to a department already struggling with funding difficulties. As the Commission has previously noted following its development of its current strategic plan, "the most consistent theme from all the [Environmental Stakeholder Committee] and town hall meetings was the need for additional and more stable funding for ADEM. In the wake of the current State fiscal crisis, ADEM has received severe funding cuts and further cuts are expected." Alabama Environmental Management Commission, *Final Strategic Plan for the Alabama Environmental Management Commission and the Alabama Department of Environmental Management* (April 20, 2004), 5.

Faced with such funding difficulties, ADEM would be hard-pressed to find the resources to collect and analyze such demographic data. Admittedly, a portion of such costs (particularly with respect to the collection of data) are often passed along to the permit applicants either directly (in the form of increased permit fees) or indirectly (in the form of requiring the permit applicants to collect and provide the data themselves). Perhaps ADEM would think to do so in this case. As noted below, however, ADEM lacks the statutory authority to impose such costs on permit applicants. Thus, it should not expect to do so without significant legal challenge.

Additionally, the question of "how to fund the collection of such data?" should not overshadow an even more compelling question: "why fund the collection of such data?" None of the permitting programs referenced in the petition require or even authorize ADEM to consider demographic factors in its permitting decision. The intent of those programs is clear: to leave such local land-use decisions to local governments. ADEM's solid waste regulations, for example, require host government approval before ADEM can even consider a solid waste permit application. See ADEM Admin. Code R. 335-15-3-.02(1)(a). In short, all that the petition's requested rules would achieve would be the collection of data that, as explained below, cannot legally influence any of

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ADEM's decisions. Why, therefore, should a cash-strapped agency such as ADEM be required to undertake such an effort?

IV. The petitioners' proposed rules would be illegal.

The petition identifies five regulations for amendment, each of which arises from its own specific legislatively-enacted statute(s). It is those statutes that establish the parameters of the relevant ADEM permitting. None of those statutes authorize ADEM to develop or collect demographic data with respect to permitting activities. Nor do any of those statutes enable ADEM to require a permit applicant to develop or collect such data in its stead. Even generalized statements of ADEM's authority, such as those found in the provisions of the Alabama Environmental Management Act ("AEMA"), Ala. Code §§ 22-22A-1 through -16, do not provide the authority to undertake or require such demographic research efforts. Rather, those sections speak in general terms of ADEM promulgating rules, regulations, and standards to "carry out the provisions and intent of this chapter." See Ala. Code § 22-22A-5(2). Absolutely no discussion exists of any intention by the legislature that the AEMA provide heightened environmental protection or analysis based on race or socio-economic background. Rather, the legislature's clear intent was that ADEM provide equal protection to *all* citizens of the state.

The proposed regulations cannot survive this lack of a statutory basis. "If an agency promulgates rules or acts outside its jurisdictional limits as established by the enabling statute, the agency is said to be functioning *ultra vires*. . . . The provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation." *Kids' Club, Inc. v. State Department of Human Resources*, 874 So. 2d 1075, 1080 (Ala. Civ. App. 2003) (internal citations omitted). In the instant case, ADEM would be acting in an illegal *ultra vires* manner to promulgate a regulation requiring the collection of such data.

If Petitioners' goal in seeking demographic information is to impose restrictions on the location of industrial facilities based solely on the surrounding communities' socio-economic status, then they are asking ADEM to act well beyond the parameters of the department's regulatory authority. Given the lack of statutory authority for such efforts currently in place, the proper forum for such efforts is, of course, the legislature. Furthermore, if petitioners truly believe that ADEM is violating federal law and discriminating against minority communities with respect to its permitting decisions, then they are fully capable of filing an environmental justice complaint with the EPA.

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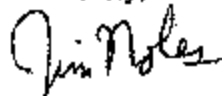
V. The AEMC should allow ongoing studies of environmental justice issues and needs to continue and conclude before undertaking a premature rulemaking of this nature.

The Commission is already taking steps to address its constituents' concerns regarding matters of environmental justice and equity. For example, it suggested, in its Strategic Plan, that ADEM provide a report to the AEMC's Strategic Planning Standing Committee regarding ways the department could develop "collaborative efforts to find ways to deal with these [environmental justice] issues, including potential changes in law." See Alabama Environmental Management Commission, *Final Strategic Plan for the Alabama Environmental Management Commission and the Alabama Department of Environmental Management* (April 20, 2004), 11. It would be far more logical, of course, to allow ADEM to finish developing this report before short-circuiting that analytical process with a premature rulemaking endeavor.

Similarly, Governor Bob Riley's recently-established Black Belt Action Commission includes committees tasked with addressing, among other issues, health and community development. These committees will identify and assess problems, set goals, develop and implement solutions, and measure results. If environmental justice is indeed an issue in Alabama's Black Belt, then this bi-partisan Commission is likely in the best position to identify it and to suggest solutions. As with ADEM's ongoing study, it is far more logical to let the Black Belt Action Commission take its course.

For all of the foregoing reasons, NSWMA respectfully requests that the AEMC reject the petition. If you have any questions regarding NSWMA's concerns or arguments in this regard, please do not hesitate to contact me.

Sincerely,



James L. Noles, Jr.
Attorney for National Solid Wastes
Management Association

JLNJR:af